Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IN RE NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

NOVA CHEMICALS INC.,

PETITIONER,

v.

LEONARD ADAMS, MICHAEL NOAL, VIRGINIA PHILLIPS, DEBRA BLACK, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED

(1) Whether Louisiana's refusal to permit a purchaser of hazardous materials to delegate the responsibility for safe interstate transport to a qualified shipper violates and is preempted by the federal statutes and regulations governing hazardous materials transportation.

(2) Whether Louisiana's refusal to permit such delegation of responsibility imposes an excessive and unconstitutional burden on interstate commerce.

PARTIES TO THE PROCEEDING

Petitioner NOVA Chemicals Inc. is the corporate successor in interest to Polysar, the company involved in the underlying events. Because prior rulings speak of "Polysar," petitioner refers to itself as "Polysar" in this petition.

Respondents in this case are Leonard Adams, Michael Noal, Virginia Phillips and Debra Black, who represent a class of approximately 8,000 individuals.

AMF-BRD, Inc. is the only other remaining defendant in the underlying case.

RULE 29.6 STATEMENT

Petitioner's ultimate parent corporation is NOVA Chemicals Corporation, an Alberta corporation that is publicly held and traded on the New York and Toronto Stock Exchanges.

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PETITION FOR A WRIT OF CERTIORARI

NOVA Chemicals Inc. (referred to herein as "Polysar") petitions for a writ of certiorari to review the judgment of the Louisiana Fourth Circuit Court of Appeal.

OPINIONS BELOW

The opinion of the Louisiana Fourth Circuit Court of Appeal (Pet. App. 1a-57a) is reported at 795 So. 2d 364. The order denying rehearing (*id.* at 58a) is reported at 794 So. 2d 956. The order of the Louisiana Supreme Court denying certiorari or review (*id.* at 59a) is reported at 827 So. 2d 411.

JURISDICTION

The Louisiana Fourth Circuit Court of Appeal entered judgment on June 27, 2001, and denied the application for rehearing on August 1, 2001. The Louisiana Supreme Court denied certiorari or review on October 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 60a-65a) reproduces the text of the Commerce Clause, U.S. Const. Art. I, Section 8, cl. 3, and the provisions of the Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990), and the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101 *et seq.*, involved in this case.

STATEMENT OF THE CASE

1. Polysar manufactured latex at a plant in Chattanooga, Tennessee. In 1987, Polysar purchased a quantity of the chemical butadiene from a supplier in Portugal and contracted for its delivery by Mitsui & Co., U.S.A. ("Mitsui"), an experienced commodities shipper. Mitsui agreed to accept the chemical from an oceangoing vessel at a port facility in Goodhope, Louisiana and to perform all the

necessary functions to safely store, load, and ship the cargo by rail to Polysar in Tennessee. (Tr. 2452-59, 2515-18). Mitsui's agent GATX Terminals ("GATX"), which leased and managed the port facility for Mitsui, loaded the butadiene into rail tank cars leased by Mitsui. (Tr. 3031-32). GATX inspected the tank cars and certified compliance with all pertinent federal regulations governing transportation of hazardous materials. GATX acknowledged that it (as agent for Mitsui) was the party that "offer[ed]" the butadiene "for transportation in commerce," under the terms of those federal regulations. (Pls. Exs. 61, 72).

Consistent with ordinary commercial practice, Polysar did not send its own employees to Mitsui's Goodhope terminal and did not participate in the loading of the butadiene or the selection or inspection of the tank cars. (Tr. 2473-74, 3169, 3073-79). Mitsui and GATX are qualified experts in the handling of hazardous cargo such as butadiene. Until this incident, Mitsui had safely shipped butadiene and other hazardous materials thousands of times to major companies throughout the country, including to Polysar for 12 years. (Tr. 2712, 3168, 3179).

As a result of a defective gasket, one of the rail tank cars loaded by Mitsui and GATX began leaking butadiene and caught fire at a major railroad interchange in New Orleans, Louisiana. Pet. App. 2a.

2. That fire ultimately resulted in litigation by a class of approximately 8,000 plaintiffs. After a trial on the claims of twenty selected plaintiffs, the jury returned a verdict awarding approximately $2 million in compensatory damages relating to an alleged increase in cancer risk, as well as for depression, anxiety, and fear that the plaintiffs suffered because of the fire. Pet. App. 39a, 42a-43a. The jury allocated fault among nine defendants. Polysar was assessed a 5% share of the compensatory damages. The jury also awarded punitive damages in excess of $3 billion

against defendants other than Polysar. The trial court subsequently reduced the compensatory damages to approximately $700,000 and the punitive damages to approximately $850 million. Pet. App. 5a-7a.

On appeal, Polysar argued that the jury's liability verdict against it must be set aside because Polysar had no duty personally to inspect the tank cars loaded by GATX and Mitsui under the federal hazardous materials statutes and the regulations promulgated by the United States Department of Transportation ("DOT"), which preempt any inconsistent requirements under state law. Polysar pointed out that, under DOT's "functional" test for determining the "shipper" or "offer[or]" of hazardous materials, Mitsui and GATX were the parties responsible for compliance with the federal regulations in this instance. Polysar also explained that the regulations, as interpreted and applied by DOT, explicitly permitted Polysar to allocate these regulatory duties to Mitsui and GATX by contract and commercial practice—as a matter of federal law.

The Louisiana Fourth Circuit Court of Appeal nonetheless held that Polysar retained various inspection and other (undefined) duties which, as a matter of Louisiana tort law, could not be delegated to Mitsui and GATX. Although its decision was framed partly in terms of the federal regulations, the court made almost no effort to interpret those regulations or engage the interpretive guidance provided by DOT. The Louisiana court wrote that the federal regulations apply not only to a "'shipper' (*whatever a 'shipper' is*)," but also to any "'person [who] may offer or accept a hazardous material for transportation in commerce,'" noting that the latter "*seems* as applicable to Polysar, whose butadiene was being transported, as it is to Mitsui." Pet. App. 52a (emphasis added) (alteration in original). The court did not mention or apply DOT's functional test for determining the "shipper" or "offer[or]"

subject to the regulations. The court instead considered it sufficient that Polysar was the title owner of the cargo, with the theoretical right, as title owner, to direct and oversee its transportation. The court stated that because the duties it imposed on Polysar, as title owner, were "importan[t] . . . to the public safety," and therefore non-delegable as a matter of State law, "whether Mitsui is an 'independent contractor' to Polysar is of no moment." *Id.*

On August 1, 2001, the Fourth Circuit denied Polysar's application for rehearing. Pet. App. 58a. The Louisiana Supreme Court denied certiorari on October 14, 2002. *Id.* at 59a.

REASONS FOR GRANTING THE PETITION

In the 1975 Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990) ("HMTA"), Congress recognized the importance of a comprehensive and uniform federal law governing the transportation of hazardous materials in the United States. Acting under authority delegated by Congress, DOT promulgated extensive Hazardous Materials Regulations ("HMR" or "DOT regulations"), which impose various packaging, inspection and certification duties on shippers and carriers of hazardous materials. The HMTA expressly preempts any State law requirements which are inconsistent with that statute and its implementing regulations. 49 App. U.S.C. § 1811 (1990).

Under the regulations, binding formal guidance from DOT, and longstanding commercial practice, those regulatory duties are generally performed by independent shipping companies experienced in the handling of hazardous materials. DOT's pragmatic test for determining the shipper (or "offeror") of hazardous materials imposes regulatory compliance duties on the party that, by contract and/or ordinary commercial practice, actually performs the

relevant regulated function—such as packaging, loading and unloading, and transporting hazardous materials.

In this case, the Louisiana Fourth Circuit Court of Appeal held that an owner of hazardous materials transported in interstate commerce from, through, or to Louisiana is personally liable for the safe handling and transport of those materials *regardless of whether the owner has arranged for the shipment to be made by a qualified independent contractor.* Although the court gave lip service to the hazardous materials regulations promulgated by DOT, it utterly ignored DOT's dictate that the regulatory obligations for safe packing, handling, and transport fall on the parties that, pursuant to contract or custom, actually carry out those functions. In direct conflict with DOT's "functional" standard, the court held that an owner of hazardous materials cannot delegate to qualified independent transportation contractors the legal responsibility for the functions they perform.

The practical consequence of the court's ruling is that purchasers of industrial chemicals or other hazardous materials located anywhere in the United States must now send an employee representative to second-guess the shipper's inspection and packaging of any cargo originating from, or merely passing through, the State of Louisiana. The rule of law adopted by Louisiana is a prescription for confusion, delay, and conflict between cargo owners and hazardous materials shippers—who remain responsible for regulatory compliance as a matter of *federal* law. That rule is expressly preempted by the HMTA, which preempts any State requirements that are inconsistent with those imposed by that statute and DOT's implementing regulations. Because it imposes a severe and disuniform burden on the transportation of hazardous materials in interstate commerce, without any substantial local benefit, it is also squarely foreclosed by the dormant Commerce Clause.

The potential costs and effects of the court's ruling are staggering. The Office of Hazardous Materials Safety estimates the number of hazardous materials shipments in the United States at approximately 800,000 daily or in excess of 300 million per year, totaling 3.2 billion tons.[1] Moreover, a disproportionate share of those shipments move through the State of Louisiana, home to the world's busiest port complex and to two of the four largest railroad junctions handling hazardous materials shipments nationwide.[2] Without this Court's immediate intervention, this decision will therefore have dramatic, deleterious consequences for the efficiency and safety of our Nation's transportation system. Polysar respectfully believes that the starkness of the Louisiana court's error and the national importance of the decision warrant certiorari, and that this would be an appropriate candidate for summary reversal. If this Court is uncertain whether certiorari is warranted, Polysar also respectfully suggests that it would be appropriate to request the views of the Solicitor General.

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[1] *Departmentwide Program Evaluation of the Hazardous Materials Transportation Programs* at i, v (DOT March 2000) (referred to herein as "DOT 2000 Report").

[2] The data is contained in the Federal Multimodal Database-The Commodity Transportation Survey, maintained by the Bureau of the Census cited by U.S. Congress, Office of Technology Assessment, *Transportation of Hazardous Materials*, OPA-SET-304 (Washington, DC: U.S. Government Printing Office, July 1986) (referred to herein as the "OTA Report").

I. THE NON-DELEGABLE STATE LAW OBLIGATIONS IMPOSED ON PURCHASERS OF HAZARDOUS MATERIALS BY LOUISIANA ARE PREEMPTED BY THE HMTA AND DOT REGULATIONS.

A. Congress Enacted The HMTA To Create A Consistent, Uniform Body Of Federal Law Governing The Transportation Of Hazardous Materials.

Congress enacted the HMTA in 1975[3] "to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." The HMTA drew "the Federal Government's ... fragmented regulatory and enforcement power over the movement of hazardous materials in commerce into *one consolidated and coordinated effort* under the direction of the Secretary of Transportation." *City of N.Y. v. United States Dep't of Transp.*, 715 F.2d 732, 741 (2d Cir. 1983) (quoting S. Rep. No. 93-1192, at 1 (1974)) (emphasis added), *cert. denied*, 465 U.S. 1055 (1984). The objective was "'to replace a patchwork of state and federal laws and regulations' concerning the transportation of hazardous materials 'with a scheme of uniform, national regulations.'" *Chlorine Inst. v. Cal. Highway Patrol*, 29 F.3d 495, 496 (9th Cir. 1994) (quoting *S. Pac. Transp. Co. v. Pub. Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990)).[4]

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[3] Pub. L. No. 93-633, 88 Stat. 2156 (1975).

[4] *See also, e.g., Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1581 (10th Cir. 1991); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986); *Nat'l Tank Truck Car Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979).

When Congress amended and recodified the HMTA in the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. § 5101 *et seq.* ("HMTUSA"), it reiterated the importance of clear, consistent and uniform standards governing the transportation of hazardous materials. Among other things, Congress found that:

> (3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,
>
> (4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,
>
> (5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. No. 101-615, 104 Stat. 3244, 3245, *quoted in* 49 App. U.S.C. § 1801 note (1993) (Congressional Finding: 1990) (congressional declaration of policy); *see also Colo. Pub. Utils. Comm'n*, 951 F.2d at 1580-81 (collecting and summarizing legislative history).

B. Federal Hazardous Materials Regulations Impose Compliance Obligations On the Party Actually Performing Shipping "Functions."

Under authority delegated to it under the HMTA, DOT promulgated comprehensive regulations governing the transportation of hazardous materials, *see* 49 C.F.R. pts. 171-79.[5] These regulations impose packaging, inspection, certification and other duties on parties involved in the transportation process—variously described as shippers, carriers, and persons who "offer or accept a hazardous material for transportation in commerce." *E.g.*, 49 C.F.R. § 171.2(a).

Although that last formulation might seem quite broad at first blush, it is actually a term of art with a specific regulatory meaning. DOT has promulgated a formal interpretation clarifying that the "offer[or]" of hazardous materials under the regulations is to be determined on a practical, "functional" basis. Under DOT's functional approach, the "person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned by the regulations to the offeror" becomes the party responsible for compliance with the regulatory requirements imposed on offerors. Notice No. 90-2, Formal Interpretation of Regulations Issued Under the HMTA, 55 Fed. Reg. 6758 (Feb. 26, 1990). Determining who will be treated as the "functional" offeror under the regulations "require[s] consideration of all relevant facts, including ownership of the materials, functions performed or undertaken by the parties, past practices of the parties, and contractual arrangements among the parties." *Id.*

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[5] Authority for the current regulations derives from the statute as recodified by the HMTUSA.

As DOT's discussion and the accompanying examples make clear, the duties imposed on "offer[ors]" by the regulations may be delegated by contract and commercial practice. A purchaser of hazardous materials does not "offer or accept a hazardous material for transportation" within the meaning of the regulations unless it is responsible for performing the regulated *functions* (i.e., packaging, loading, certification) in question. Mere ownership of title to the cargo at the time those functions are performed *does not* transform a purchaser of hazardous materials into an "offer[or]" under the federal regulations. *Id.*

DOT's formal interpretation of its own regulations is entitled to considerable deference. *See, e.g., Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982) (deference to administrative construction of a regulation is "clearly in order") (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). As this Court explained in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), when construing the National Traffic and Motor Vehicle Safety Act,

> Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements .... In these circumstances, the agency's own views should make a difference.

529 U.S. at 883 (citations omitted). The Louisiana Court of Appeal was similarly required to defer to DOT's functional responsibilities test when determining whether Polysar was an "offer[or]" of hazardous materials under DOT's own regulations.

C. The Duplicative Obligations Imposed On Owners of Hazardous Materials By Louisiana Are Preempted By The HMTA And DOT Regulations.

1. Congress Sought To Preempt All State Law Requirements That Would Undermine The Consistency And Uniformity Sought By Federal Hazardous Materials Regulation.

To promote the stated goals and purposes of the HMTA, Congress sought to preempt the field of interstate transportation of hazardous material in all but very limited cases. 49 App. U.S.C. § 1811 (1990); *see City of N.Y.*, 715 F.2d at 740 (preemption provision under HMTA has a "broad sweep"). Congress inserted express preemption language into the HMTA "in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation." S. Rep. No. 93-1192, at 37 (1974). Moreover, DOT consistently has opined and recognized that "the comprehensiveness of the HMR issued to implement the HMTA, severely restricts the scope of historically permissible state and local activity." *See, e.g.*, Inconsistency Ruling No. IR-31, 55 Fed. Reg. 25,572 (June 21, 1990); Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989).

The HMTA preemption provision in effect at the time of this accident expressly preempted "[a]ny requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or a regulation issued under this chapter." 49 App. U.S.C. § 1811 (1990).[6] By regulation, DOT set forth two criteria it would

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[6] Agency regulations, properly promulgated pursuant to congressional authority, "have the force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), and therefore the same preemptive effect as federal statutes. *See, e.g., de la Cuesta*, 458 U.S. at 153.

consider in determining whether a non-federal requirement was "inconsistent" with the HMTA or the regulations: (1) whether compliance with both the non-federal and federal requirement is possible, and (2) the extent to which the non-federal requirement is an obstacle to the accomplishment and execution of the HMTA and the regulations issued thereunder. 49 C.F.R. § 107.209(c)(1), (2) (1987). These criteria mirror this Court's established standards for determining when a federal statute impliedly preempts state law. *See, e.g., Hillsborough County v. Automated Med. Labs*, 471 U.S. 707, 713 (1985) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Geier v. Am. Honda Motor Co.*, 529 U.S. at 873-74; *Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527 (2002). Legal "requirements" in this context include obligations imposed by judicial decision under state tort law. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that regulations promulgated by DOT under the Federal Railroad Safety Act, 49 U.S.C. § 20106, preempt state tort actions).[7]

This Court has explained that the relevant inquiry under this "obstacle" test for implied preemption is whether State law poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County*, 471 U.S. at 713. As the lower courts

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[7] Although the specific HMTA preemption provision applicable here was amended and recodified by the HMTUSA, the substantive standard has not changed. When it passed the HMTUSA in 1990, Congress expressly codified the conflict preemption test formerly articulated by the regulations. The HMTUSA now expressly preempts any legal "requirement" of a State if compliance with the State requirement makes it impossible to comply with federal statutes or regulations, or if the State requirement, "as applied or enforced, is an obstacle to accomplishing and carrying out this chapter" or "a regulation prescribed under this chapter." 49 U.S.C. § 5125(a).

have consistently recognized, that test has extraordinary force in this context because Congress's central "purpose[] and objective[]" in passing the HMTA was precisely to achieve consistency and uniformity in the nationwide regulation of hazardous materials transportation. *See supra* at 7-8. And when passing the HMTUSA, Congress expressly found that "consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable," and that State requirements which duplicate or add to federal standards create "the potential for unreasonable hazards in other jurisdictions" by "confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements." Pub. L. No. 101-615, § 2, 104 Stat. at 3245.

The United States Courts of Appeals have considered several State requirements imposing additional duties on shippers of hazardous materials, and have consistently held that such requirements are preempted by federal law.[8] The Ninth Circuit in *Southern Pacific Transportation Co. v. Public Service Commission*, 909 F.2d 352 (9th Cir. 1990), held that Nevada regulations requiring hazardous materials carriers to obtain separate State permits were preempted by the DOT regulations. Although it would have been possible to comply with both the State and federal standards, the Ninth Circuit emphasized that DOT had already promulgated numerous requirements related to loading, unloading and shipping hazardous materials—and that the State permit regulations "create[d] a separate

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[8] DOT has similarly found several State requirements to be obstacles to the goals of HMTA, and therefore preempted. *See, e.g.*, Inconsistency Ruling No. IR-22, 52 Fed. Reg. 46,574 (Dec. 8, 1987); Inconsistency Ruling No. IR-19, 52 Fed. Reg. 24,404 (June 30, 1987); Inconsistency Ruling No. IR-20, 52 Fed. Reg. 24,396 (June 30, 1987); *see also* Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989) (cataloging the inconsistency preemption rulings DOT issued during the time of this incident).

regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform national scheme of regulation." *Id.* at 358.

In *Chlorine Institute v. California Highway Patrol*, 29 F.3d 495 (9th Cir. 1994), the Ninth Circuit considered a California Highway Patrol regulation requiring separate escort vehicles for the transport of chlorine and oleum by highway within California. The Ninth Circuit again emphasized that "state regulations pertaining to an area already regulated under the [regulations] pose an obstacle to the goal of uniform national standards for the transportation of hazardous materials," and held that CHP's regulations were preempted. 29 F.3d at 497.

And in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), the Tenth Circuit considered a variety of requirements that Colorado attempted to impose on persons transporting radioactive materials in that State. Colorado required, for example, that carriers obtain a State permit, provide the State with advance notice of shipment, and carry an inspection report in the vehicle. The Tenth Circuit noted that "enactment of separate information and documentation requirements in even a few of the thousands of local jurisdictions across the country would lead to the multiplicitous regulations Congress sought to avoid." 951 F.2d at 1582. "Because Colorado's regulation forces transporters of hazardous materials to generate and maintain additional documentation and information, we conclude that it is likely to confound shippers and carriers and to increase the potential for hazards in other jurisdictions." *Id.* The court held that "Colorado's regulations simply do not further the federal purpose of promoting safety through uniformity," and are therefore preempted. *Id.*

2. The State Law Requirements Imposed By Louisiana Are Inconsistent With The Structure And Objectives Of The HMTA And The DOT Regulations.

The substantive tort duties imposed by Louisiana in this case are inconsistent with the federal regulations, and far more disruptive to the uniformity and coherence of federal law than the modest documentation requirements invalidated in the cases described above.

DOT's "functional" test for determining the shipper or "offer[or]" sensibly assigns regulatory compliance obligations (and legal responsibility for compliance) to the party who actually performs the functions. 55 Fed. Reg. 6758 (citing Interpretation No. 88-1-RSPA). DOT also recognizes that commercial practice and private contractual arrangements can determine which party is responsible for compliance with particular hazardous materials regulations. *Id.*

The Louisiana court of appeal did not apply DOT's analysis or anything like it. If it had, it would have been obliged to conclude that Mitsui, not Polysar, "offer[ed]" the tank car in question for transportation in commerce. Considering the factors identified by DOT in its formal interpretation: (1) Mitsui and GATX actually performed every one of the functional obligations assigned to the shipper or offeror under the regulations; (2) the contractual arrangements assigned the duties to Mitsui and there was no contrary, credible evidence below; and (3) evidence introduced at trial established a twelve-year past practice of assigning these compliance duties to Mitsui. Mitsui (and, for certain functions, its agent GATX) was clearly the "functional" offeror under DOT's approach.

The Louisiana court did not even purport to hold that Polysar performed regulated functions as recognized by DOT under the regulations. Instead, the court held that

Louisiana tort law imposes certain duties on the ultimate purchaser and title owner of hazardous cargo (duties ostensibly based on, but in fact inconsistent with, the federal regulations), and that those duties are—again, as a matter of Louisiana tort law—completely non-delegable by contract or otherwise. The court also pointed generically to the commercial realities that Polysar pays to have its product shipped, would have been aware that its products would be shipped over established rail lines, and could conceivably have specified by contract the specific tank cars that Mitsui should use. Pet. App. 47a. None of these facts distinguish Polysar from every other purchaser/owner of a hazardous materials cargo, and none are relevant to DOT's functional shipper analysis.[9] In the end, the Louisiana court imposed liability on Polysar solely because Polysar was the title owner of the cargo in question. That rule cannot be reconciled with DOT's regulations and interpretive guidance, which make it clear that ownership alone does not determine responsibility for regulatory compliance.

To put the point another way, Louisiana's dictate that these compliance responsibilities are absolutely non-delegable as a matter of State law, and therefore that "whether Mitsui is an independent contractor to Polysar is of no moment," is flatly in conflict with DOT's regulations and guidance. DOT has made it perfectly clear that these compliance responsibilities can, as a matter of *federal* law, be shifted away from the title owner to a qualified independent contractor either by private contract or settled trade practice. *See* 55 Fed. Reg. 6758. Louisiana's rule placing these obligations on Polysar and every other

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[9] If the purchaser *in fact* intervened by contract or otherwise in such matters as tank car selection, then it might to that extent be considered the functional shipper under DOT's test; but the unexercised theoretical possibility of such intervention does not transform a passive purchaser into the functional shipper.

innocent cargo owner is directly in disregard of and ignores DOT's clear mandates on this matter.

Only this Court can resolve this conflict, and its intervention is urgently needed. The practical consequence of the Louisiana court's decision is that purchasers of hazardous materials, wherever located in the United States, must send a representative to Louisiana, in person, to supervise and second-guess the actions of independent professional hazardous materials transport companies operating in (or simply moving through) that State.

As DOT, the federal regulations, and the entire chemical industry[10] recognize, that regime is unworkable, unsafe, and simply makes no sense. Companies like Polysar have always hired qualified independent contractors like Mitsui and GATX to perform specialized tasks such as operating seaports and terminaling facilities. Nonetheless, Polysar was held liable in this case because it failed to send one of its employees to Louisiana, to question Mitsui's judgment about such matters as tank car inspections and how best to unload butadiene from a ship at Mitsui's own port facility. Notably, however, the Louisiana court offered no guidance

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[10] The American Chemistry Council ("Council") filed an *amicus curiae* brief before the Supreme Court of Louisiana in this case. The Council represents more than 90% of our Nation's productive capacity of basic industrial chemicals, and associates closely with and monitors DOT action with respect to all aspects germane to the transport of hazardous materials. The Council represented to the court that it had reviewed all pertinent DOT decisions, interpretations and enforcement actions relative to offeror status and stated that it "is unaware of any evidence or legal precedent in the record that would support the Fourth Circuit's interpretation that Polysar 'offered' hazardous material for transportation within the meaning of DOT regulations." The Council further represented that "after diligent inquiry," it "has been unable to uncover a single situation where DOT enforcement officials have even attempted to enforce their regulations in a manner consistent with the Fourth Circuit interpretation." Brief on Behalf of American Chemistry Council Amicus Curiae in Support of Writ Application at 5 (Sept. 12, 2001).

about how to resolve a dispute if Polysar and Mitsui *disagreed* about how Mitsui should best fulfill its regulatory compliance obligations.

The logic of the Louisiana court's decision suggests that Polysar was similarly not entitled to trust CSX Railroad's compliance with *its* responsibilities under the HMTA and federal regulations either, and should have had a Polysar employee riding shotgun on the train all the way to Tennessee. Presumably Polysar was also obligated to send one of its employees along on the ship which arrived from Portugal and unloaded the butadiene at a Louisiana port, to ensure that the crew properly complied with their duties under the HMTA and DOT regulations—or any other statutes that impose duties which affect "public safety" and therefore now cannot be delegated by cargo owners as a matter of Louisiana State law.

With respect, this simply cannot be the law. At best, Louisiana's rule is a prescription for confusion, delay, and inefficient duplication at our Nation's ports, rail terminals, and other trans-shipment hubs. That alone would suffice to establish preemption under the standards laid out in the HMTA, its implementing regulations, and the cases cited above. The disruption, disuniformity and inefficiency[11] created by Louisiana's rule vastly exceeds that associated with the relatively modest documentation requirements invalidated in cases like *Southern Pacific Transportation Co.* and *Colorado Public Utilities Commission.*

At worst, moreover, Louisiana's rule threatens to significantly increase the risk of major industrial accidents.

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[11] In the HMTUSA, Congress expressly found that "the movement of hazardous materials in commerce is necessary and desirable to maintain economic vitality and meet consumer demands," and that the purpose of the statute was therefore "reasonable, adequate and *cost-effective* protection from the risk posed by the transportation of hazardous materials." Pub. L. No. 101-615, § 2, 104 Stat. at 3245 (emphasis added); *see also Colo. Pub. Utils. Comm'n*, 951 F.2d at 1582 n.11.

First, that rule will encourage often novice cargo owners to interfere with and second-guess the judgment of specialist experts in the field of hazardous materials transport. DOT's regulations permit the delegation of "offer[or]" duties by contract because DOT sensibly encourages cargo owners to contract with experts in the field of regulatory compliance to fulfill those duties. Notice No. 90-2, 55 Fed. Reg. at 6760 (citing Interpretation No. 88-1-RSPA); *see also Hawkins v. Evans Cooperage Co.*, 766 F.2d 904, 908 (5th Cir. 1985) (manufacturer entitled to rely on expertise of its independent contractor, a common carrier with 20 years of experience in shipping hazardous substances). Louisiana's rule prevents such delegation, and provides no mechanism for resolving conflicts between the cargo owner and the actual functional shipper—which remains responsible for regulatory compliance as a matter of *federal* law.

Second, DOT has recognized that clarity in the designation of responsibility for compliance obligations is essential to safe handling of hazardous materials, since human error is the single greatest contributing factor in hazardous materials incidents. DOT 2000 Report at xiii. In fact, DOT data shows that roughly 80% of the hazardous materials incidents are attributed to human error. *Id.* The Louisiana rule foments confusion and requires duplication at this most sensitive level. DOT has consistently determined that State regulations intended to be more stringent or duplicative of the federal regulatory requirements are preempted. *See* Notice No. 89-3, 54 Fed. Reg. 26,710 (June 23, 1989). "[D]uplication in a regulatory scheme where the Federal presence is so pervasive can only result in making compliance with [the regulations] less likely, with an accompanying decrease in overall public safety." Inconsistency Ruling No. IR-5, 47 Fed. Reg. 51,991, 51,994 (Nov. 18, 1982), *quoted in Mo. Pac. R.R. v. R.R. Comm'n*, 671 F. Supp. 466, 481 (W.D. Tex. 1987), *aff'd on other*

grounds, 850 F.2d 264 (5th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

Third, Congress and DOT have repeatedly recognized that delay itself poses serious safety risks—for the obvious reason that the odds of an accident increase the longer that hazardous materials are in transit. *See Colo. Pub. Utils. Comm'n*, 951 F.2d at 1580-81. As DOT has explained:

> The manifest purpose of the HMTA and the Hazard Materials Regulations is safety in the transportation of hazardous materials. Delay in such transportation is incongruous with safe transportation. Given that the materials are hazardous and that their transport is not risk free, it is an important safety aspect of the transportation that the time between loading and unloading be minimized.

Inconsistency Ruling No. IR-2, 44 Fed. Reg. 75,566, 75,571 (Dec. 20, 1979), *quoted in Mo. Pac.*, 671 F. Supp. at 480; *see also* Inconsistency Ruling No. IR-16, 50 Fed. Reg. 20,872, 20,879 (May 20, 1985) ("[A]n important aspect of transportation safety is the minimization of time in transit. This objective has been incorporated in the HMR."), *quoted in Mo. Pac.*, 671 F. Supp. at 480. Several courts have held that requirements which will cause further delay in the transport of hazardous materials are preempted for that reason. *See, e.g., Jersey Cent. Power & Light*, 772 F.2d 1103, 1113 (3d Cir. 1985); *Nat'l Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509, 515 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983); *Mo. Pac*, 671 F. Supp. at 480-81.

Even a small disruption of DOT's carefully crafted statutory and regulatory scheme governing hazardous materials transportation could result in a catastrophic accident. There are approximately 800,000 hazardous materials shipments every day in the United States. DOT 2000 Report at i, v. DOT strives for zero tolerance in the handling of hazardous material, and estimates that 99.996%

of hazardous shipments by rail currently reach their final destination without incident.[12] *Id.* at v. In this area, one serious incident is one too many. There was testimony in this case that this single tank car, if it had exploded, could have destroyed several city blocks. Pet. App. 14a. The confusion, disruption and delay introduced by this decision are simply incompatible with Congress's goals of uniformity and safe transportation of these commodities.

Although the rule adopted in this case would be preempted by federal law if promulgated by any State, the fact that it was imposed by Louisiana creates unique risks to the national transportation system and general economy. Louisiana is a major transportation hub, particularly for the chemicals industry. The federal database for monitoring commodity flow divides the country into nine regions. According to the 1986 OTA Report, more than 25% of the hazardous materials transport flow originates in the West South Central Region, while more than 20% terminates there as well. OTA Report at 53. This region is comprised only of four states: Louisiana, Texas, Oklahoma and Arkansas. *Id.* at 47. Louisiana is home to two of the four largest railroad junctions (New Orleans and Shreveport) through which the flow of hazardous materials occurs in this country. *Id.* at 53. New Orleans, the city in which this case arose, is also home to the world's busiest port complex.[13] The Port of New Orleans is America's most intermodal port serviced by 6 of the 8 Class I railroads, 50 ocean carriers, 16 barge lines and 75 truck lines. The port is on the world's busiest waterway with more than 6,000 ocean vessels annually moving through New Orleans. New Orleans'

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[12] This data is published by the Association of American Railroads. *Railroad Tank Cars: The Safe Way to Ship Hazardous Materials, available at* http://www.aar.org/ViewContent.asp?Content_ID=405.

[13] Data regarding the Port of New Orleans is published at The Port of New Orleans web site, *available at* http://www.portno.com/facts.htm.

strategic location at the mouth of the Mississippi River and on the Gulf of Mexico makes Louisiana the gateway for the flow of products to and from the growth areas of our country—namely the southeast and the southwest. In addition, Louisiana has prominence as one of the leading producers of chemicals in our country. Against that backdrop, correcting the Louisiana court's error in this case is a matter of urgent national importance.

II. LOUISIANA'S NON-DELEGATION RULE VIOLATES THE COMMERCE CLAUSE.

For many of the same reasons that it creates an obstacle to fulfillment of the goals of the HMTA and the DOT regulations, the rule of law recognized by Louisiana in this case also effects an unconstitutional interference with the flow of interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3.

A. State Actions That Impose Excessive Burdens on Interstate Commerce Violate the Commerce Clause.

This Court has long recognized that the Commerce Clause "not only grant[s] Congress express authority to override restrictive and conflicting commercial regulations adopted by the States," but also serves as a "limitation upon the power of the States." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571-72 (1997) (citations omitted). Where a State law[14] does not directly regulate or discriminate against interstate commerce, but nonetheless adversely affects interstate commerce, this Court employs a deferential "balancing test." A law will be invalidated when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "[T]he

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[14] This Court has recognized in the dormant Commerce Clause context that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996).

practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). This Court has also invalidated State laws under the dormant Commerce Clause (even though non-discriminatory to out-of-state interests), where such laws undermined a compelling need for national uniformity in regulation. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997) (collecting cases).

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), for example, this Court invalidated an Arizona law limiting the length of trains that could be operated in that State. This Court acknowledged that Arizona justified the law by reference to local public safety concerns, but held that it was nonetheless invalid because it imposed an excessive burden on interstate commerce. This Court emphasized that varying State regulation of train lengths would "require[] interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state." 325 U.S. at 773. "The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." *Id.* Given that extraterritorial "practical effect," this Court held that "[t]he serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent." *Id.* at 775. This Court also critically evaluated the safety justifications advanced by Arizona, and concluded that they were unpersuasive in light of various unintended *negative* consequences to public safety (relating,

for example, to the operation of shorter but more numerous trains). *Id.* at 779.

Similarly, in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), this Court considered an Illinois statute which required all trucks on Illinois highways to install an unusual style of mud flap. Illinois contended that these flaps reduced debris thrown up into the path of other vehicles. This Court concluded, however, that the safety evidence was "far too inconclusive" to justify the burden imposed on interstate commerce. 359 U.S. at 530. As in *Southern Pacific Co.*, this Court emphasized that Illinois' unique rule would be costly and disruptive for interstate carriers that had the simpler, straight mud flaps widely used in (and in at least one case *required by*) other States. As a consequence, the Illinois law could "mak[e] it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached." *Id.* at 526. That problem suggested a strong "'need for national uniformity in the regulations for interstate travel.'" *Id.* at 527 (quoting *Morgan v. Va.*, 328 U.S. 373, 386 (1946)) (invalidating State statute which required reseating of passengers on an interstate bus to comply with local segregation law).

B. Louisiana's Non-Delegation Rule Imposes An Excessive Burden On Interstate Commerce.

The rule adopted by the court of appeal in this case imposes a substantial and unjustifiable burden on interstate commerce of precisely the sort invalidated in *Bibb* and *Southern Pacific Co.*

Purchasers of hazardous materials nationwide regularly contract with specialized transport companies for the delivery of hazardous materials. Consistent with the DOT regulations and the established common law governing independent contractors, purchasers rely on these independent transportation experts to take all necessary

steps to comply with the specific regulatory duties (and any derivative tort duties) associated with the shipment of those materials. That is how business generally is, and has been, done across the United States.

The Louisiana tort rule adopted in this case imposes an entirely different and inconsistent legal regime on purchasers of hazardous materials, wherever located, to the extent that the product they have ordered ever travels through Louisiana. As soon as the ordered materials cross the Louisiana State line, the rule adopted here requires every remote purchaser (or at least every purchaser that has acquired title to the goods) to assume direct personal control of and responsibility for compliance with hazardous materials packaging and inspection requirements—and to maintain that control and responsibility until the cargo again crosses the State line out of Louisiana. Cargo owners from every State will be required to crisscross the country in a fruitless effort to duplicate regulatory functions that had been properly assigned to experts.[15] Given that there are approximately 800,000 shipments of hazardous material daily, a large proportion of which pass through Louisiana, the resources or trained personnel to comply with such absurd requirements simply do not exist.

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15 A sampling of the probable scenarios: (1) a Florida company purchasing hazardous material from Texas will be required to travel to Texas to inspect the rail cars and loading procedures since the product almost certainly is to traverse Louisiana; (2) a Virginia corporation will be required to send a representative to Louisiana to duplicate HMR duties in the event that it purchases a chemical from a Louisiana company; (3) a Louisiana company purchasing hazardous material from a Michigan producer will be required to travel to Michigan to duplicate compliance responsibility. Terminaling of the product in Tennessee or Illinois or any other state between Michigan and Louisiana will require inspection by a representative of the purchaser. In addition, what is characterized by DOT as residue shipments (product remaining in the heel of a tank car *after* delivery to the purchaser) likewise will require duplicative oversight babysitting by representatives of innocent purchaser until the cars have returned to their point of origin.

The rule adopted by Louisiana in this case also has the same practical tendency to dictate commercial behavior *outside* the State that this Court identified as fatal to the laws invalidated in *Bibb* and *Southern Pacific Co.*. Remote purchasers of hazardous materials that will be forced to assume responsibility for regulatory compliance when their orders cross Louisiana will, as a practical matter, eventually assume responsibility for such compliance at the outset of and throughout the shipment. For that reason, the Louisiana rule is practically, if perhaps not formally, extraterritorial in application—making the need for uniform national regulation in this area plainly apparent. Indeed, that was precisely the insight that motivated Congress to enact the HMTA.

Absent federally enforced uniformity, even nationwide acquiescence to Louisiana's novel dictates may not ultimately be a viable alternative for interstate shippers of hazardous materials. This Court has recognized that it is appropriate to consider how a State rule "may interact with the legitimate regulatory regimes of other States," and "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. If Louisiana is entitled to specify that these duties may not be delegated by cargo owners, then other States could presumably hold that they may not be delegated away from the entities actually handling and transporting hazardous materials. (Indeed, that rule would be both more sensible and more consistent with the federal scheme). But such action would make uniform compliance with the law across a multi-state route essentially impossible.

CONCLUSION

For the reasons stated, we respectfully submit that the questions presented by this petition warrant certiorari, and that this case would be an appropriate candidate for summary reversal. If this Court is uncertain whether

certiorari is warranted, however, petitioner believes that it would be appropriate to call for the views of the Solicitor General.

Respectfully submitted,

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COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

In re NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

No. 2000-CA-0479

June 27, 2001

This is a class action. It arises out of a chemical leak and fire involving a railroad tank car. After a two-phase trial, the jury found all defendants liable for compensatory damages and several defendants liable for punitive damages. The quantum of compensatory damages was determined as to each of twenty selected plaintiffs. The quantum of punitive damages was determined as to each of the several defendants found liable for punitive damages. All but three of the defendants settled. The three non-settling defendants bring the present appeal.

Defendant-appellant CSX Transportation, Inc. ("CSX") was held liable for 15% of the compensatory damages and was held liable for punitive damages. Defendant-appellant AMF-BRD, Inc. ("AMF-BRD") was held liable for 5% of the compensatory damages but was not held liable for punitive damages. Defendant-appellant Nova Chemicals, Inc. ("Polysar") was held liable for 5% of the compensatory damages but was not held liable for punitive damages. AMF-BRD and Polysar appeal as to liability for compensatory damages. AMF-BRD, Polysar and CSX all appeal as to the quantum of compensatory damages. CSX appeals as to liability for, and quantum of, punitive damages. The plaintiffs have answered these appeals and seek additional damages and prejudgment interest on punitive damages. For the reasons given below, we affirm the judgment of the trial court. Additionally, we remand this

case to the trial court for proceedings as to the quantum of compensatory damages with respect to the remaining class members and for any other proceedings as are necessary to conclude this action.

On September 9, 1987, a pressurized railroad tank car which was loaded with butadiene ("GATX 55996") was parked on the interchange tracks of CSX in a residential area, Gentilly, of New Orleans. At about 1:50 a.m., GATX 55996 leaked and ignited. Butadiene is a carcinogenic hazardous chemical. It is flammable and also volatile, so that it can explode. The chemicals produced by burning butadiene include several carcinogenic hazardous chemicals. The butadiene leaked from GATX 55996 as a heavier-than-air gas so, as it leaked from GATX 55996, it spread out along the ground to the surrounding residential areas. Eventually, the butadiene reached an ignition source, possibly the hot water heater of a home, ignited, and flashed back to GATX 55996, which itself ignited. Five other pressurized tank cars loaded with butadiene were coupled to the now-flaming GATX 55996.

GATX 55996 burned for two days and, throughout that time, butadiene and the products of burning butadiene were carried by the wind, and deposited as soot, throughout the surrounding residential area. There was a danger that GATX 55996 might either explode, possibly destroying a number of city blocks, or even take off like a missile and travel as far as a mile through the surrounding residential area. There also was a danger that the fire might spread from GATX 55996 to the other five pressurized tank cars of butadiene to which GATX 55996 was coupled. Such a spread of the fire would result in further hazardous chemical release and further danger of explosions.

The neighborhood around the fire was evacuated. As it turned out, GATX 55996 did not explode (although some of

the released butadiene did explode) and, after two days, the fire burned itself out. Also, the other five pressurized tank cars loaded with butadiene were successfully uncoupled and moved away from GATX 55996, so the fire never did spread to those five tank cars. After the fire burned itself out, the people of the surrounding areas were allowed to return home.

Class action suits were filed against nine defendants which, after some corporate name changes, are now known as: The Alabama Great Southern Railroad Company ("AGS"), AMF-BRD, Inc. ("AMF-BRD"), CSX Transportation Inc. ("CSX"), GATX Terminals Corporation ("GATX"), General American Transportation Corporation ("GATC"), Illinois Central Railroad Company ("Illinois Central"), Mitsui & Company (U.S.A.), Inc. ("Mitsui"), Nova Chemicals, Inc. ("Polysar"), and Phillips Petroleum Company ("Phillips"). The plaintiffs sought not only compensatory damages, but also punitive damages under Article 2315.3 of the Civil Code, because the butadiene leak and fire involved a hazardous or toxic substance. The roles of the nine defendants are, briefly and generally described, as follows: AMF-BRD manufactured the pressurized tank which was installed in GATX 55996. The installation of the tank, and the overall assembly of GATX 55996, was done by non-party North American Car Corporation ("NACC"), which is now out of business. The pressurized tank on GATX 55996 which was manufactured by AMF-BRD had a "manway" (an opening through which the car is cleaned) on the bottom. The bottom manway was sealed using an asbestos gasket. NACC sold GATX 55996 to Phillips. During the course of apparently routine maintenance, Phillips replaced the asbestos gasket with a rubber gasket. Butadiene can react with a rubber gasket causing a leak. Also, Phillips misaligned the rubber gasket and this, too, could cause a

leak. Phillips then sold GATX 55996 to GATC. GATC labeled GATX 55996 as a butadiene tank car and owned GATX 55996 at the time of the butadiene leak and fire at issue. At the time of the butadiene leak, GATX 55996 was leased by GATC to Mitsui. On September 4, 1987, five days before the butadiene leak and fire, GATX, which is an affiliate of GATC, loaded GATX 55996 with butadiene at GATX's Good Hope, Louisiana terminal. The butadiene was owned by Polysar and was being shipped to a Polysar plant in Chattanooga, Tennessee. Polysar bought the butadiene overseas and arranged for it to be brought by ship to Louisiana and then off loaded to rail tank cars at GATX's Good Hope terminal. Polysar did not send anyone to Good Hope to inspect the rail tank cars or observe their loading. On September 5, 1987, Illinois Central, at GATX's Good Hope terminal, put GATX 55996 into a train with other butadiene tank cars and transported it to an Illinois Central train yard. Illinois Central then moved GATX 55996 to interchange tracks where Illinois Central and AGS exchange railroad cars. (An "interchange" is an area of track where one railroad leaves rail cars for another railroad.) AGS then moved GATX 55996 to CSX's interchange tracks in Gentilly. AGS delivered GATX 55996 and some other rail cars to CSX, and notified CSX's employees to pick up GATX 55996 and the other rail cars, at about 7:25 p.m. on September 8, 1987. GATX 55996 remained on CSX's interchange tracks for over six-and-a-half hours until the fire broke out.

Another panel of this court affirmed the trial court's certification of a class. *See Adams v. CSX Railroads,* 615 So.2d 476 (La.App. 4th Cir.1993). Later, on defense writ applications, another panel of this court reversed the trial court's denials of motions for summary judgment with respect to punitive damages, and granted summary judgment with respect to punitive damages, as to defendants

AMF-BRD, Phillips and GATC, but affirmed the trial court's denials of motions for summary judgment by other defendants with respect to punitive damages. *In re New Orleans Train Car Leakage Fire Litigation*, 95- 2710, 95-2721, 96-0016, 95-2734, 95-2811, 96-0017, 95-2797, 96-0015 (La. App 4 Cir. 3/20/96), 671 So.2d 540, writ denied, 96-0972, 96-0984, 96-1287, 96-0977, 96-1311, 96-0978 (La.6/28/96), 675 So.2d 1120-22, cert denied, 519 U.S. 1009, 117 S.Ct. 512, 136 L.Ed.2d 402 (1996). Just prior to trial, the Louisiana Supreme Court, on defense writ applications, ruled that the jury should not be instructed to determine the amount of punitive damages (if any) by applying a multiplier to the amount of compensatory damages. *In re New Orleans Train Car Leakage Fire Litigation*, 97-1150, 97-1161 (La.6/27/97), 697 So.2d 239.

In the first phase of the trial, the jury determined liability for compensatory damages, quantum of compensatory damages as to twenty plaintiffs (ten selected by plaintiffs' counsel and ten selected by defense counsel) and liability for punitive damages (but not quantum of punitive damages). The jury found all nine defendants liable for compensatory damages and fixed varying amounts of compensatory damages for each of the twenty selected plaintiffs. Defendant-appellant CSX was assessed 15% of the liability for compensatory damages while defendant-appellants AMF-BRD and Polysar were each assessed 5% of the liability for compensatory damages. The jury found five of the defendants liable for punitive damages—CSX, AGS, GATX, Illinois Central and Mitsui. In the second phase of the trial, the jury determined the amounts of punitive damages—$2.5 billion as to CSX, and a total of $865 million in varying amounts against GATC, AGS, Mitsui and Illinois Central.

On September 25, 1997, the trial court rendered a judgment in accordance with the jury's verdicts which judgment assessed liability for compensatory damages, assessed liability for punitive damages, awarded compensatory damages to the twenty selected plaintiffs and awarded punitive damages "payable to class members who now or hereafter are awarded compensatory damages...." Subsequently, upon a CSX writ application, the Louisiana Supreme Court ruled that "the trial court erred in rendering a judgment awarding damages prior to rendering a judgment adjudicating all liability issues". *In re New Orleans Train Car Leakage Litigation*, 97-2547 (La.10/13/97), 702 So.2d 677. The trial court then, on June 17, 1998, rendered a judgment that awarded neither compensatory damages nor punitive damages. Subsequently, upon defense writ applications and a plaintiff's motion for clarification, the Louisiana Supreme Court held that the trial court should "enter judgment in favor of the twenty phase I plaintiffs on the issue of liability, allocation of fault and damages, both compensatory and exemplary" and designate that judgment as final "for purposes of post-trial motions and appellate review". *In re New Orleans Train Car Leakage Litigation*, 98-2399, 98-2622 (La. 2/24/99), 728 So.2d 853.

On April 8, 1999, the trial court rendered a judgment as directed by the Supreme Court. All of the defendants filed post-judgment motions. Those post-trial motions raised issues as to liability for compensatory damages, quantum of compensatory damages, liability for punitive damages and quantum of punitive damages. Prior to the trial court's ruling upon those defense post- judgment motions, six of the defendants, AGS, GATX, GATC, Illinois Central, Mitsui and Phillips, settled. Thus, as of the time of the trial court's decision of the post-judgment motions, the three remaining

defendants were CSX, AMF-BRD and Polysar and, of those three, only CSX was subject to a judgment for punitive damages. On November 5, 1999, the trial court rendered reasons for judgment on the post-judgment motions and: (1) upheld the determination of liability for compensatory damages: (2) set aside the awards of compensatory damages as to every one of the twenty selected plaintiffs and awarded lower compensatory damages to each of the twenty selected plaintiffs; (3) upheld the determination of CSX's liability for punitive damages and (4) reduced the quantum of punitive damages imposed upon CSX from $2.5 billion to $850 million. The trial court also held that interest would run on compensatory damages from the date of judicial demand and interest would run upon punitive damages from the date of signing of judgment. On November 17, 1999, the trial court rendered a judgment in accordance with its November 5, 1999 reasons for judgment. With respect to punitive damages, the trial court allocated small fractions of the $850 million awarded to the twenty selected plaintiffs (using a formula proposed by CSX and the plaintiffs and agreed to by the trial court) which totaled about $2.1 million and, as to the remainder of the punitive damages award, held that it should be paid into escrow and allocated to the remaining 8,000 + class members in accordance with further proceedings. The trial court certified its judgment for immediate appeal.

CSX, AMF-BRD and Polysar appeal the trial court's November 17, 1999 judgment and the plaintiffs have answered that appeal.

CSX's Appeal As To Punitive Damages

CSX argues on appeal that the punitive damages judgment against it should be reversed, vacated or reduced to no more than $1 million. CSX advances four arguments.

First, CSX argues that its conduct was not sufficiently egregious to warrant the imposition of punitive damages. Article 2315.3 of the Civil Code, at the time of the chemical leak and fire, provided that:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's *wanton or reckless disregard for public safety* in the storage, handling, or transportation of hazardous or toxic substances. (emphasis added).

The leading case on liability under Article 2315.3 is *Billiot v. BP Oil Co.*, 93-1118 (La.9/29/94), 645 So.2d 604. In *Billiot*, the Supreme Court stated the purposes of Article 2315.3 thus:

> Accordingly, we conclude that the purpose of Article 2315.3 is threefold: (1) to penalize and punish defendants for engaging in wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances that causes injury to others; (2) to deter the tortfeasor and others who might follow their example from exposing the public to dangers of that kind in the future; and (3) to provide victims injured by such conduct with the incentive to act as the prosecutors of penal laws against such wrongdoers. Article 2315.3 is not designed to repair the injuries of tort victims.

645 So.2d at 612-13.

The Supreme Court's *Billiot* decision also identifies four elements of a cause of action under Article 2315.3:

In establishing the separate and distinct right to seek the exemplary or punitive award, however, the introductory clause of Article 2315.3 does not relieve the plaintiff of the burden of proving the basic factual elements of a tort case. To the contrary, Article 2315.3 itself, by its narrow authorization of punitive damages awards under special circumstances, imposes a more onerous proof requirement than plaintiffs face in ordinary negligence cases. In order to obtain an award of exemplary or punitive damages, the plaintiff first must prove that the defendant's conduct was wanton or reckless. In practice, this standard obliges the plaintiff to prove at least that the defendant proceeded in disregard of a high and excessive degree of danger, either known to him or apparent to a reasonable person in his position. *Prosser & Keeton*, supra, § 34, at 213-14. In other words, the "wanton" or "reckless" conduct that must be proved is highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. Id. at 214; see also *Griffin v. Tenneco Oil Co.*, 531 So.2d 498, 501 (La.App. 4 Cir.1988) (quoting *Cates v. Beauregard Electric Cooperative, Inc.*, 316 So.2d 907, 918 (La.App. 3 Cir.1975)). Second, the plaintiff must show that the danger created by the defendant's wanton or reckless conduct threatened or endangered the public safety. Third, the statute requires proof that the defendant's wanton or reckless conduct

> occurred in the storage, handling or transportation of hazardous or toxic substances. Finally, the plaintiff is required to prove that his or her injury was caused by the defendant's wanton or reckless conduct consisting of all of these elements.

645 So.2d at 613. See also *Gaspard v. Orleans Parish School Board*, 96-1754 (La.App. 4 Cir. 2/5/97), 688 So.2d 1298.[1]

It is clear from *Billiot* that liability under Article 2315.3 does not require any intentional wrong. Instead, the degree of culpability required under Article 2315.3 and *Billiot* "fall[s] somewhere between simple negligence and intentional wrong doing". *Griffin v. Tenneco Oil Co., 625 So.2d 1090, 1091 (La.App. 4th Cir.1993), writ denied, 631 So.2d 449 (La.1994).* The requisite conduct is, in effect, "gross negligence". Id. See *Sharp v. Daigre, 555* So.2d 1361, 1364 n. 10 (La.1990) ("Wanton negligence is still negligence[.]").

We review the jury's determination of liability for punitive damages under the clearly wrong-manifestly erroneous standard of review. See *Dekeyser v. Automotive Cas. Ins. Co.*, 97-1251 (La.App. 4th Cir 2/4/98), 706 So.2d 676, 684 (discussing punitive damages under Article 2315.4). Thus, we may not set aside the jury's finding if it is one as to which reasonable minds could differ. See, e.g., *Stobart v. State Through DOTD*, 617 So.2d 880 (La.1993). The question is not whether we, as an initial matter, would make the same finding as did the jury on the issue of liability for

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[1] The *Billiot* opinion's reference to "a more onerous proof requirement" refers to the four elements that need to be shown rather than to the evidentiary burden of proof. *Rivera v. United Gas Pipeline Co., 96-502, 96-503, 97-161 (La.App. 5th Cir 6/30/97), 697 So.2d 327, 334-35.* The usual "preponderance of the evidence" standard applies to claims under Article 2315.3. *Id.*

punitive damages but, instead, whether, in light of the record as a whole, the jury's finding was unreasonable. Id. This is a function of the allocation of responsibility between the finder of fact and the appellate court.

It is undisputed that, from the time GATX 55996 and the other five pressurized butadiene tank cars were left at CSX's interchange by AGS, about six and one-half hours passed before the leaking butadiene ignited. It is also undisputed that, during that six and one-half hours, no inspection was made of GATX 55996 or the other five pressurized butadiene tank cars. There was expert testimony that a simple inspection of GATX 55996 would have detected the leak. Butadiene has a low odor threshold and can be smelled at concentrations in the air of two parts per million. For butadiene to ignite, as happened in this case, it must appear in the air at concentrations of 20,000 parts per million. In fact, the ignition source was some ways away from GATX 55996 and, nearer the source of the leak (i.e. the tank car), the concentrations of butadiene in the air must have been even greater. When CSX had other hazardous material tank car leaks in Gentilly, it dealt with the situation by isolating the leaking tank car, repairing the leak or offloading the hazardous cargo onto trucks. In short, the jury reasonably could have concluded that a simple inspection of GATX 55996 would have prevented the butadiene fire.

The issue boils down to whether the jury reasonably could find that, by not inspecting GATX 55996 and the other five pressurized butadiene tank cars for a period of six and one-half hours while they sat on CSX's interchange tracks in the Gentilly residential area, CSX acted in "wanton or reckless disregard of the public safety", Civ.Code art. 2315.3, as that element is described in *Billiot*. The actual explanation for why CSX did not inspect GATX 55996 for so long is that GATX 55996 was never brought from CSX's

interchange tracks into CSX's main yard. CSX's Gentilly yard employees testified that CSX's Gentilly interchange tracks are located outside of CSX's main Gentilly yard. After rail cars are left for CSX on CSX's interchange tracks, they are brought into the main yard by CSX. Once the rail cars are brought into the main yard, they are inspected for leaks. Rail cars are not inspected for leaks while they are on CSX's interchange tracks.

CSX's employees testified that there were two possible reasons why rail cars would be left upon CSX's interchange tracks for such an extended period. First, there could be a shortage of track space in the main yard upon which to park the rail cars. Second, there could be insufficient CSX personnel on duty to move the rail cars into the main yard in the timely manner. In the present case, there were tracks available in the main yard on the night of September 8- 9, 1987, so the lengthy delay in moving GATX 55996 and the other five pressurized butadiene tank cars into the main yard was caused by lack of sufficient CSX personnel on duty. In any event, the important issue is not per se the delay in moving GATX 55996 and the other pressurized butadiene tank cars into the main yard but, rather, the delay in inspecting the tank cars for leaks. Put another way, regardless of whether CSX brought the tank cars into the main yard and inspected them for leaks there, or whether CSX broke with its standard practice and inspected the tank cars for leaks while they were still on CSX's interchange tracks, the fire would have been prevented if GATX 55996 had been inspected in a timely manner.

The several CSX employees who worked in the Gentilly yard and testified gave no explanation for CSX's apparent policy of not inspecting hazardous materials tank cars so long as they were on CSX's interchange tracks. The rationale for CSX's apparent policy as to inspection of hazardous material

tank cars in Gentilly, i.e. inspecting them for leaks (apparently promptly) once they are brought into CSX's main yard but not inspecting them at all so long as they remained on CSX's interchange tracks, regardless of how long they remain on CSX's interchange tracks, is not apparent to us. The tank cars would in no way be any less hazardous while they were on CSX's interchange tracks (as might be the case if, for example, the interchange tracks were located in a remote, unpopulated area). The issue of safety is affected by how promptly the tank cars are inspected for leaks, not whether they are located on the interchange tracks versus tracks in the main yard.

The record reveals at least five circumstances that could have led the jury to find that failure to inspect for leaks in a timely manner pressurized butadiene tank cars on CSX's interchange tracks constituted "wanton or reckless disregard for public safety" as provided in Article 2315.3 and discussed in *Billiot*. First, butadiene is an extremely hazardous substance and, in fact, is considered one of the 100 most hazardous substances. It is carcinogenic, flammable and volatile/explosive. The products of burning butadiene include several carcinogenic hazardous chemicals. Thus, any release of butadiene creates a very substantial risk. An inspection of a tank car or other rail car carrying non-hazardous cargo might be deferred properly as a matter of convenience. However, a rail car carrying a hazardous cargo, particularly a pressurized tank car carrying a liquid or gaseous ultrahazardous chemical cargo, should be inspected promptly for leaks.

Second, the six pressurized butadiene tank cars parked on CSX's interchange tracks, including GATX 55996, contained a very large quantity of butadiene. GATX 55996 carried 30,000 gallons of butadiene and, presumably, each of the other five tank cars carried a similar amount. The leak

and two-day fire involving GATX 55996 alone contaminated many city blocks of homes with butadiene as well as soot containing the carcinogenic products of burning butadiene. Obviously, if the fire had spread from GATX 55996 to the other five tank cars, the amount of butadiene and butadiene burn products released would have been increased fivefold. The explosion of GATX 55996 alone could have destroyed city blocks of homes. The explosion of all six tank cars would, of course, have been even more devastating. There also was the possibility that GATX 55996 would take off like a missile, flying as much as a mile in any direction and wrecking havoc far and wide. It is difficult to imagine the death and destruction that could result from a single such missile, much less six. Thus, the risk presented by a butadiene leak was, in the present case, massive because of the large amount of butadiene involved. The large quantity of butadiene involved made the need for prompt inspection for leaks more urgent.

Third, CSX's interchange tracks, where the butadiene tank cars were left until GATX 55996 caught fire, are located in a densely-populated residential area. A butadiene leak on a remote stretch of railroad track in an uninhabited rural area is not nearly so serious as such a leak in an urban area and, in particular, in a residential area. Thus, while an inspection of a hazardous tank car in some locations properly might be deferred as a matter of convenience, a hazardous cargo tank car arriving in a densely-populated residential area, such as Gentilly, presents the strongest possible need for prompt inspection for leaks. In fact, the New Orleans Fire Chief, well prior to the leak and fire at issue, had requested of CSX that, when tank cars were parked near the residential area of the French Quarter for more than two hours, CSX have someone keep watch over them. CSX argues that this request was related specifically to the

French Quarter and did not relate to Gentilly. That is correct but the point that CSX should have drawn from the Fire Chief's request is that the Fire Department did not want tank cars left unattended near residential areas for more than two hours. The hazard presented to the residents of Gentilly was the same as the hazard presented to the residents of the French Quarter.

Fourth, as testified to by defense expert witness William Cruice, the railroad industry is well aware that all tank cars leak. Thus, the butadiene leak in this case was not at all an unforeseeable type of accident. Obviously, it is because of CSX's knowledge that rail tank cars leak that CSX inspects them for leaks once they are brought into CSX's main yard at Gentilly. Yet, there is no reason that rail tank cars are any less likely to leak while on CSX's Gentilly interchange tracks than while in CSX's Gentilly main yard. Thus, CSX's knowledge that rail tank cars leak, combined with the obvious fact that rail tank cars can leak on the interchange tracks just as easily as they can leak in the main yard, could well have suggested to the jury that there was a need for CSX to inspect promptly for leaks pressurized butadiene tank cars delivered to CSX's interchange tracks.

Fifth, at least ten tank car leaks were detected in Gentilly's main yard in the three and one-half year period prior to the GATX 55996 butadiene leak and fire and, in fact, six of them occurred in the seven months preceding the GATX 55996 leak and fire. This certainly put CSX on notice of the need to inspect hazardous materials tank cars in Gentilly. CSX argues that these ten prior leaks are of no import to this case because these leaks were detected in the Gentilly main yard rather than on the Gentilly interchange tracks. The fact that the ten leaks were detected in the CSX main yard, rather than on the CSX interchange tracks, is explained simply by the fact that CSX does not inspect tank

cars for leaks while they are on the interchange tracks and, instead, inspects them only once they are brought into the main yard. The general point is that CSX was aware that, from time to time, leaking tank cars were arriving in Gentilly and the jury could reasonably find that this was another reason for CSX to inspect promptly for leaks in arriving tank cars carrying hazardous materials even while they were on the interchange tracks.

CSX argues that there is no evidence that its employees actually knew that GATX 55996 was leaking prior to the ignition of the butadiene. However, the issue is whether CSX should have known of the GATX 55996 leak in time to prevent the fire. If CSX should have known that GATX 55996 was leaking, then, in legal terms, CSX is said to have "constructive knowledge" of the leak even if it had no actual knowledge of the leak.

The Louisiana Supreme Court discussed the concept of constructive knowledge in tort law at some length in its decision in *Levi v. Southwest Louisiana Electric Membership Cooperative*, 542 So.2d 1081 (La.1989). The question in Levi was whether the defendant power company should be held liable for an electrical hazard of which it did not have actual knowledge. The *Levi* court analyzed the issue thus:

> A power company is required to recognize that its conduct involves a risk of causing harm to another if a reasonable person would do so while exercising such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence and judgment as a reasonable person would have ... If the company has in fact more than a minimum of these qualities, it is required to exercise the superior qualities

> that it has in a manner reasonable under the circumstances ... The standard becomes, in other words, that of a reasonable person with such superior attributes ...
>
> It is well recognized that those who engage in certain activities or come into certain relationships with people or things are under a peculiar obligation to acquire knowledge and experience about that activity, person or thing. A carrier owes to its passengers the duty of discovering all detectable defects. Manufacturers must learn of dangers that lurk their products ... Traditionally, professionals as well as manufacturers must keep reasonably abreast of current advances in their fields ...
>
> By the same token, a company which maintains and employs high power lines is required to exercise the utmost care to reduce hazards to life as far as practicable ... Pursuant to this duty, a power company has an obligation to make reasonable inspections of wires and other instrumentalities in order to discover and remedy hazards and defects ... Consequently, a company will be considered to have constructive knowledge of an electrical hazard which has existed for a period of time which would reasonably permit discovery had the company adequately performed its duties ...

542 So.2d at 1085-86 (citations omitted).

In *Levi*, the power company was held to have a duty to make reasonable inspections to discover hazards and was held to have constructive knowledge of hazards which had

existed for a sufficient length of time to permit discovery had reasonable inspections been made. We believe that a similar analysis applies to the present case because the transportation of hazardous materials involves risks at least as great as those involved with the provision of electricity.

As a professional transporter of hazardous substances by rail, CSX has an obligation to be knowledgeable about the possible hazards involved and the means and methods of preventing or remediating them. This would include knowledge of both the possibility of leaks in pressurized tank cars and the hazardous nature of butadiene. CSX also has "an obligation to make reasonable inspections" "in order to discover and remedy hazards and defects", *Levi*, supra, in pressurized tank cars carrying hazardous materials in urban areas. CSX also is properly considered to have constructive knowledge of a leak of hazardous cargo "which has existed for a period of time which would reasonably permit discovery had the company adequately performed its duties [of inspection]". Id.

There is substantial evidence in the record from which the jury reasonably could have concluded that GATX 55996 was already leaking when it was delivered to CSX's interchange tracks six-and-a-half hours before the leaking butadiene ignited. The plaintiff's expert mechanical engineer, Andrew McPhate, opined that GATX 55996 began leaking as soon as it was loaded with butadiene in Good Hope and that the leak became worse and worse up to the start of the fire. CSX's expert witness Steve Verret found physical evidence, in the form of higher butadiene readings along the tracks in the direction from which GATX 55996 had come to CSX's interchange tracks, which suggests that the tank car already was leaking when it was delivered to the interchange tracks. Thus, the jury reasonably could conclude that CSX had a period of six-and-a-half hours, prior to the fire, to

inspect GATX 55996 and discover and remediate the leak. The jury also reasonably could conclude that an inspection of the six pressurized butadiene tank cars should have taken place less than six-and-a-half hours after their delivery to CSX's interchange tracks. In making such a finding, it is appropriate to consider that, even if the chance of any particular tank car leaking and igniting is small, the possible harm that can occur from even a single leak is enormous, and the additional cost of a more timely inspection is little or nothing. *Levi*, 542 So.2d at 1086-87.

We recognize that the *Levi* case did not involve Article 2315.3 and that *Levi* dealt with ordinary negligence and not the "reckless or wanton" conduct addressed in Article 2315.3 and discussed in *Billiot*. Thus, we hold that, while it is permissible to apply the Levi rule of constructive knowledge in an Article 2315.3 case, it must be done in the context of proving reckless or wanton misconduct and not mere ordinary negligence. While the doctrine of constructive knowledge can be used to prove fault in both ordinary negligence cases and in Article 2315.3 cases, the Article 2315.3 plaintiff must use it to prove "*highly* unreasonable conduct, involving extreme departure from ordinary care", *Billiot*, 645 So.2d at 613 (emphasis added), as opposed to the ordinary negligence plaintiff who need prove only any unreasonable conduct and any departure from ordinary care.

CSX argues that it is per se inappropriate to apply the doctrine of constructive knowledge in an Article 2315.3 case. We disagree because the doctrine of constructive knowledge is, as we have just discussed, a means of proof rather than a standard as to what must be proven. Further, we believe CSX's argument is foreclosed by the *Billiot* decision which states that wanton or reckless conduct involves the defendant proceeding in the face of danger either known to him "or apparent to a reasonable person in his position". 645

So.2d at 613. This language in *Billiot* appears to embrace the concept of constructive knowledge and obviate any requirement of actual knowledge of danger in Article 2315.3 cases.[2]

CSX's second argument as to punitive damages is based upon the procedural circumstance that the quantum of punitive damages was determined when the quantum of compensatory damages had been determined as to only 20 of 8,047 plaintiff class members. CSX argues that there is a constitutional Due Process requirement of a "reasonable relationship" between the amount of punitive damages and the amount of compensatory damages. Thus, so CSX's argument goes, as the jury did not know the amount of compensatory damages for the class as a whole, it could not have determined the amount of punitive damages in a constitutionally proper way. Consequently, CSX argues, there must be a new trial as to the amount of the punitive damages. (Thus, CSX is not, by this argument, literally challenging liability for punitive damages, which was decided in the Phase I trial, but rather the Phase II trial which determined the amount of punitive damages.) Although CSX does not explicitly so state, the logical implication of CSX's argument is that the new trial as to the amount of punitive damages would not take place until there have been

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[2] CSX points out that there is no evidence that CSX was cited by any regulatory authority in connection with the GATX 55996 leak and fire. Neither *Billiot* nor Article 2315.3 itself makes regulatory citation a predicate to an Article 2315.3 action. In fact, it already has been held, in an Article 2315.3 case, involving the GATX 55996 leak and fire, that compliance with government regulations does not preclude tort liability. *Galjour v. General American Tank Car Corp.*, 764 F.Supp. 1093, 1101 (E.D.La.1991).

determinations of the compensatory damages to be awarded to each one of the 8,047 class members.[3]

We disagree with CSX's argument because the "reasonable relationship" Due Process factor is one to be considered upon appellate (or trial court) review of a jury's determination of the amount of punitive damages rather than a factor to be considered by the jury itself in determining the amount of punitive damages as an initial matter. Thus, the lack of a determination of compensatory damages as to all class members as of the time of trial of the amount of punitive damages is irrelevant, at least in terms of constitutional Due Process, because there is no Due Process requirement that the jury consider the amount of compensatory damages when determining the amount of punitive damages.

The status of the "reasonable relationship" factor as part of a Due Process constitutional analysis of whether an award of punitive damages is excessive was established by *BMW of North America, Inc. v. Gore, 517* U.S. 559, 116 S.Ct. 1589, 1601-1603, 134 L.Ed.2d 809 (1996), and was discussed in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 2721-22, 125 L.Ed.2d 366 (1993), and was mentioned in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 1045-46, 113 L.Ed.2d 1 (1991). In all three of these cases, the "reasonable relationship" Due Process factor was addressed in the context of appellate review of the quantum of punitive damages awards. None of these three cases holds that the "reasonable relationship" factor must be considered by the jury. In *Haslip*, the jury instruction on punitive damages did not include any reference to the

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[3] There has been an additional Phase III trial in which there have been determinations of the compensatory damages to be awarded to each of an additional 20 selected plaintiffs.

"reasonable relationship" factor, see 111 S.Ct. at 1037 n. 7, but, despite the fact that the *Haslip* court "carefully reviewed" that jury instruction, 111 S.Ct. at 1044, it was found to be acceptable. Also, the *Haslip* court appears to have contemplated that the "reasonable relationship" factor would be applied on appeal when it stated: "The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."

The Louisiana Supreme Court, in a decision upon a defense writ application in this case, closely approached the question of whether the jury should consider the amount of compensatory damages in setting the amount of punitive damages:

> In addition to compensatory damages, the class seeks punitive damages under former Louisiana Civil Code article 2315.3. Under the trial plan set out in the trial court's case management orders, the trial court's plan indicates that after the jury has determined whether or not to assess punitive damages:
>
> The jury will determine punitive damages for the class as a whole as punishment for the defendant's conduct by use of a multiplier based on what the compensatory damages to a given plaintiff are.
>
> It is this instruction, that the jury should use a multiplier in assessing punitive damages, to which defendants complain.
>
> In *BMW of North America, Inc. v. Gore, 517 U.S.* 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the United States Supreme Court, in

> reviewing the punitive damages award to the plaintiff for excessiveness, examined the amount of punitive damages and compensatory damages awarded and compared the ratio between the two. Thus, a multiplier is used as a standard of review to determine if the punitive damage award is excessive and unreasonable. *BMW of North America, 517 U.S.* at 580-581, 116 S.Ct. at 1601.
>
> Therefore, considering the foregoing, in the event the jury in this matter determines that defendants are liable for punitive damages, the trial court is prohibited from instructing the jury that it may use a multiplier when determining the amount of punitive damages that can be awarded, but should instruct the jury to determine that amount of punitive damages by consideration of all relevant factors.

In re New Orleans Train Car Leakage Fire Litigation, 97-1150, 97- 1161 (La. 6/27/97), 697 So.2d 239 (emphasis added) (footnotes omitted). It appears that the Louisiana Supreme Court, using the term "multiplier" to refer to the *BMW* "reasonable relationship" factor, held that factor to be applicable to appellate (or trial court) review of jury verdicts rather than to the jury's determination of the amount of punitive damages as an initial matter. Thus, under the Louisiana Supreme Court's decision, there is certainly no Due Process requirement that the jury, in setting the amount of punitive damages, consider the amount of compensatory damages.

Lastly, to the extent that CSX is arguing that, because there has not yet been a determination of the amount of

compensatory damages as to all of the plaintiff class members, CSX is denied Due Process by a lack of appellate (or trial court) review of the "reasonable relationship" factor, we disagree with CSX's argument for a new trial on the quantum of punitive damages for two reasons. First, even if the present lack of a determination of the amount of compensatory damages prevented appellate court (or trial court) review of the jury's determination of the amount of punitive damages (a position with which we do not agree), that would not require a new trial on the quantum of punitive damages. Rather, it would be necessary merely to await the determination of the amounts of compensatory damages before subjecting the jury verdict on amount of punitive damages to appellate (or trial court) review. CSX's appeal could be stayed or dismissed without prejudice perhaps with a stay of execution of judgment. Second, and more to the point in light of our appellate review of the quantum of punitive damages set forth below, we believe that the BMW mandated Due Process review of the jury's verdict can be performed on the present record despite the procedural circumstance that the amounts of compensatory damages for most of the plaintiff class members have not yet been determined. We will address this point further below in our review of the quantum of punitive damages.

CSX's third argument on appeal as to punitive damages is that, by entering a judgment on punitive damages as to the whole plaintiff class, rather than limiting the judgment on punitive damages to the 20 selected plaintiffs whose compensatory damages were determined in the Phase I trial, the trial court violated the instructions of the Louisiana Supreme Court given in two decisions upon writ applications. In the first of those two decisions, *In re New Orleans Train Car Leakage Fire Litigation*, 97-2547 (La.10/31/97), 707 So.2d 677, the Louisiana Supreme Court

did hold that the trial court should not render a judgment upon punitive damages until "all liability issues" had been adjudicated. The Court based this upon Article 593.1 of the Code of Civil Procedure. However, in the second decision upon writ applications, the Court took a different approach. *In re New Orleans Train Car Leakage Fire Litigation*, 98-2399, 98-2622 (La.2/24/99), 728 So.2d 853. In its February 24, 1999 decision, the Court directed the trial court to enter judgment in favor of the 20 selected plaintiffs as to liability, allocation of fault and damages, both compensatory and punitive, and to designate that judgment as final for purposes of post-trial motions and appellate review. Id. However, the Court did not prohibit the trial court from entering a judgment as to punitive damages with respect to the entire class. Thus, in its February 24, 1999 decision, which appears to supercede its October 31, 1997 decision, the Court appears to have left open for the trial court to decide, at least as an initial matter, whether to enter judgment on punitive damages as to all class members.

Also, the October 31, 1997 decision, which prohibited entry of any judgment as to punitive damages, was based upon Article 593.1 of the Code of Civil Procedure and, in its February 24, 1999 decision, the Court stated:

> On reconsideration, we have some doubt that Article 593.1 (now repealed) was applicable at all, since all issues of the liability of the defendants apparently had been adjudicated by the trial court, although there are still causation issues to be decided as to the remaining plaintiffs.

728 So.2d at 854 n. 3. As the issue of CSX's liability for punitive damages was decided in the Phase I trial, and even the issue of the overall quantum of punitive damages was decided in the Phase II trial, so that the only punitive

damages issue left to be determined is the allocation of the total punitive damages award among the individual class members (an issue in which CSX has no interest), it does appear that Article 593.1 does not bar entry of a judgment as to the total amount of punitive damages owed to the entire class.

Lastly, in its February 24, 1999 decision, the Court remarked "given the size of this verdict and the length of time since its entry, as well as the length of this litigation over the 1987 incident, immediate review of this judgment would be beneficial to both sides". 728 So.2d at 854. It seems more consistent with the Court's expressed intent (now over two years ago) to speed the resolution of this long-running litigation, for the trial court to proceed with entry of an immediately-appealable judgement as to the total punitive damages owed to the entire class than to defer entry of that judgment to what could be a much later date. The trial court did not err by entering a judgment as to the total punitive damages owed to the entire class.

CSX's fourth and final argument as to punitive damages is that the $850 million judgment (which the trial court entered after rejecting the jury's $2.5 billion verdict) is so excessive as to constitute (1) an unconstitutional arbitrary deprivation of property without due process of law and (2) an abuse of discretion under Louisiana tort law.

We will address first CSX's Due Process argument. We turn to the guidance supplied by the United States Supreme Court in its *BMW, TXO* and *Haslip* decisions. While BMW provides the most recent, and perhaps most systematic, analysis of whether a punitive damages award is so large as to constitute a denial of Due Process, *BMW* does not overrule *TXO* or *Haslip* and, in fact, relies upon those two earlier decisions. Thus, we will apply all three of the Court's pronouncements upon this issue. We address the Due

Process issue on a de novo review basis. *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

In *BMW*, the defendant was found liable for $4,000 in compensatory damages for purely economic harm because it sold a car to the plaintiff without disclosing that the car had been repainted prior to sale. The BMW jury awarded $4,000,000 in punitive damages which was reduced to $2,000,000 by the Alabama Supreme Court. The Court looked to three "guideposts", 116 S.Ct. at 1598, as to whether the $2,000,000 punitive damages award was unconstitutional: the degree of reprehensibility of the defendant's conduct, the ratio of punitive damages to the compensatory damages (i.e. the "reasonable relationship" factor) and the difference between the punitive damages and the criminal and civil penalties that could be awarded by statute.

The *BMW* court described the degree of reprehensibility of the defendant's conduct as "perhaps the most important" of the guideposts to the constitutionality of a punitive damages award. The Court then stressed that the harm in the *BMW* case was "purely economic" and presented no danger to health or safety:

> In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm *BMW* inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no effect on its performance or safety features, or even its appearance for at least nine months after his purchase. *BMW's* conduct evinced no indifference to or reckless disregard for the health and safety of others.

116 S.Ct. at 1599 (emphasis added). Both the potential harm in the present case, widespread death, injury and destruction

for miles across a city, and the actual harm in the present case, particularly the exposure of an entire residential neighborhood to carcinogenic hazardous chemicals, make the harm in the *BMW* case the very antithesis of the present case. The jury determined that CSX acted wantonly or recklessly, a finding which we have found to not be clearly wrong/manifestly erroneous, and that wantonness or recklessness created a danger to the health and safety of others of truly extraordinary magnitude. Clearly the "degree of reprehensibility" guidepost, perhaps the most important guidepost, weighs heavily in favor of the conclusion that the punitive damages award is not unconstitutionally excessive.

CSX argues that the second *BMW* "guidepost", the ratio of punitive damages to the compensatory damages (i.e., the "reasonable relationship" factor), cannot be applied here because the amounts of compensatory damages to be awarded to each of the bulk of the plaintiff class members have not yet been determined. Therefore, CSX argues, it is necessarily deprived of one element of a constitutionally-mandated appellate (or trial court) review of the jury's verdict. We disagree with CSX for two reasons.

First, in *BMW*, the Court compared the punitive damages to only the compensatory damages because, in *BMW*, there was only factual harm and no potential harm. However, in *TXO*, there had been a large amount of potential harm. In fact, in *BMW*, the Court, after discussing the "potential harm" analysis of *TXO*, distinguished *TXO* by stating that "there is no suggestion that Dr. Gore [the *BMW* plaintiff] or any other *BMW* purchaser was threatened with any additional potential harm by BMW's nondisclosure policy". *116 S.Ct. at 1602.* Usually, juries are asked to determine the amount of actual harm (i.e. compensatory damages) but are not asked to determine the amount of potential harm that could have occurred. In *TXO*, the jury

determined the compensatory damages to be $19,000 and awarded $10,000,000 in punitive damages. Yet, in finding the *TXO* punitive damages not unconstitutional, the *TXO* Court compared the punitive damages, not to the compensatory damages, but, rather, to the potential harm that could have occurred despite the fact that there was no jury determination of the amount of such potential harm. If CSX's argument were correct, that there can be no constitutionally-adequate review of punitive damages in the absence of a determination of the amount of compensatory damages, then the bulk of the analysis in *TXO* would have been impossible and the BMW Court would not have approved of *TXO's* potential harm analysis.

Second, we do not agree with CSX's position that we have no way to compare the amount of the punitive damages to the actual harm in this case. CSX argues that the awards of compensatory damages to just 20 of the 8,047 plaintiff class members are meaningless because 20 plaintiffs are such a small percentage of the overall class and because those plaintiffs were selected half by the plaintiffs' counsel and half by the defense counsel rather than by any statistically valid sampling technique. We disagree because, while we recognize that the trial court's determinations of the compensatory damages (made after the trial court rejected the jury's awards) may not be sufficient evidence from which to draw an inference of the average compensatory damages of all members of the class, we believe that the determinations do give an indication of the likely range and approximate order of magnitude of the compensatory damages of all of the plaintiff class members. The trial courts' awards range from a high of $116,800 to a low of $5,500. We presume that this wide range reflects the fact that the plaintiffs' counsel would have selected plaintiffs who were closest to the fire and suffered the worst damages

while the defense counsel would have selected plaintiffs who were farthest from the fire and suffered the least damages. Four plaintiffs were awarded less than $10,000, eight were awarded between $11,000 and $29,900, six were awarded $33,900 to $63,000 and two were awarded $116,800 and $116,000 respectively. From this, we generalize to say that a typical award of compensatory damages in this case is in the low to middle tens of thousands of dollars albeit with a significant number of atypical awards. The $850 million punitive damages award averages $105,562.42 per class member (although we understand that, ultimately, it may be allocated among the class members differently) so there does not seem to be an outrageous ratio of punitive damages to compensatory damages and nothing at all like the 526 to 1 ratio approved in *TXO* or the 500 to 1 ratio disallowed in *BMW*.

Although the term "ratio", used by the *BMW* Court in relation to the "reasonable relationship" factor, conjures up notions of exact mathematical calculation, the *BMW* Court in fact emphasized that the analysis involves, not mathematical formulae, but, instead, general concerns of reasonableness:

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. *TXO*, 509 U.S., at 458, 113 S.Ct., at 2720. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value

> of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said ... in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.' " Id., at 458, 113 S.Ct., at 2720 (quoting *Haslip*, 499 U.S., at 18, 111 S.Ct., at 1043). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U.S., at 481, 113 S.Ct., at 2732 (O'CONNOR, J., dissenting).

BMW, 116 S.Ct. at 1602-1603 (emphasis added). Consequently, in view of *BMW*"s eschewing of mathematical exactitude, in favor of what we would describe as a ratio used as a rough quantitative aid to a qualitative judgment as to reasonableness, we feel that our above use of the limited number of awards of compensatory damages (in terms of range of awards and rough order of magnitude) is appropriate.

We also believe that, implicit in CSX's argument, is the notion that an award of compensatory damages is the only possible information about the amount of harm suffered by the plaintiff class members. However, there was eyewitness and expert testimony as to the exposure of the plaintiff class

members to carcinogenic hazardous chemicals (butadiene and its burn products), expert testimony about the risks associated with that exposure due to the soot in the plaintiffs' homes, and eyewitness testimony about the sudden, forced middle-of-the-night evacuation of the residential neighborhood around the fire. Fright and shock among the plaintiffs must have accompanied and followed the fire and evacuation. We believe that the *BMW* Court's "general concern of reasonableness", discussed in the above quotation from *BMW*, is sufficiently broad to allow us to compare the amount of the punitive damages, not just to dollar amounts of compensatory damages, but also to the type and severity of the actual harm suffered by the plaintiffs which gives rise to their claims for compensatory damages.

As mentioned above, the quantum of punitive damages awarded by the trial court (after it rejected the jury's verdict) amounts to $105,562.42 per plaintiff. Is that amount of punitive damages too great relative to the actual harm suffered by a typical member of the plaintiff class? If a single member of the plaintiff class had sued CSX individually and been awarded $105,562.42 in punitive damages, would the acute and long-term exposure of the plaintiff to carcinogenic hazardous chemicals and the shock and fright of the fire and evacuation have been insufficient to justify constitutionally a punitive damages award of that quantum? We think not. The $105,562.42 figure is not shocking relative to the eyewitness and expert evidence of actual harm. The $850 million figure is driven by the fact that so very many people, as many as 8,047, were harmed by CSX's wanton or reckless conduct. The fact that one's wanton or reckless conduct has harmed thousands, as opposed to a few, is hardly the basis for striking down a

punitive damage award as unconstitutional (if anything, the opposite seems more likely).

We also assess the quantum of punitive damages relative to, not only the actual harm that occurred, but also relative to the potential harm that could have occurred as a result of the wanton or reckless conduct of CSX. This assessment of the ratio of the quantum of punitive damages to the potential harm (i.e., assessing whether there is a "reasonable relationship" between the quantum of punitive damages and the potential harm) was a key factor in the determination of the *TXO* Court that the $10,000,000 punitive damages award in that case, while 526 times the amount of the $19,000 actual damages, was not unconstitutional. 113 S.Ct. at 2721-22. The *TXO* Court discussed a hypothetical in which a man fires a gun wildly into a crowd, by sheer chance injuring no one, but damaging a $10 pair of glasses. The jury reasonably could find only $10 in compensatory damages but thousands of dollars in punitive damages. *113 S.Ct. at 2721.* (The "$10 pair of glasses" and "thousands" of dollars in punitive damages reflect the fact that the hypothetical was derived from a 1931 law review article.) The *BMW* Court approved the *TXO* opinion's comparison of the amount of punitive damages to the potential harm from the defendant's conduct. *BMW*, 116 S.Ct. at 1602.

In the present case, the potential harm that could have resulted from CSX's wanton, reckless conduct is truly extraordinary. If GATX 55996 had exploded, whole city blocks of a residential area could have been destroyed. No doubt if all six of the pressurized butadiene tank cars had exploded, the devastation would have been even greater. If such an explosion had occurred prior to the evacuation of the residential area surrounding CSX's interchange tracks, hundreds or even thousands of deaths and injuries could have ensued. GATX 55996 could have taken off like a

missile, as could have the other five pressurized butadiene tank cars, wreaking death and destruction for up to a mile in any direction from the scene of the fire. It is difficult to even imagine, in financial terms, the extent of liability for such a monumental catastrophe, but it is apparent that the compensatory damages resulting from it could easily exceed the quantum of punitive damages in this case. It most certainly cannot be said that the ratio of the punitive damages to the potential harm is unconstitutionally excessive. Indeed, the potential harm in this case could cause a reasonable trier of fact to award, and a reasonable court to approve, a sum more than $850 million.

The third Due Process "guidepost" applied by the *BMW* Court to the quantum of punitive damages is a comparison to the civil or criminal penalties that could be imposed for comparable conduct. CSX argues that the maximum fine that could be imposed for violation of Louisiana environmental law is a little more than $1,000,000 under La R.S. 30:2025. Thus, CSX argues, the maximum quantum of punitive damages that can be imposed in this case is $1,000,000. We disagree.

The *BMW* Court applies three "guideposts" to the Due Process analysis of quantum of punitive damages. It is a safe assumption that the *BMW* Court did not select and use the term "guideposts" without reason. The term "guideposts" does not connote or suggest a cumulative series of three "tests" or "elements" which must each be met. Rather, we see the three guideposts as (a) considerations to be expressly taken into account in order to give coherence and some degree of structure to the Due Process analysis of quantum of punitive damages and (b) a multifactor balancing test in which the three guideposts might give contradictory indications which must be weighed against one another to achieve a final result. In the present case, the first

guidepost, reprehensibility, fully supports the quantum of punitive damages awarded, the second guidepost, comparison to the actual harm and, especially, to the potential harm, would support a quantum of punitive damages much larger than was awarded, and the third guidepost, fines for comparable conduct, suggests a much lower award. Giving each of the three guideposts equal weight leads to the conclusion that Due Process is not denied by the quantum of punitive damages in this case. Thus, we reject the notion that the third guidepost, comparable fines, standing alone, "caps" punitive damages in this case at $1 million.

The $850 million punitive damages award in this case is not so "grossly excessive", *BMW*, 116 S.Ct. at 1595, as to amount to a denial of Due Process.

We turn now to the question of whether, under Louisiana tort law, the $850 million punitive damages award must be reduced. The question is whether the trial court abused its "much discretion" in setting the amount of the award. *Dekeyser v. Automotive Cas. Ins. Co.*, 97-1251 (La.App. 4 Cir. 2/4/98), 706 So.2d 676, 685. *Accord Chinigo v. Geismar Marine, Inc.*, 512 So.2d 487, 493 (La.App. 1st Cir.), writ denied, 514 So.2d 457 (La.1987).

"Many factors may be considered when determining the amount of a reasonable award of punitive damages, including 'the defendant, the defendant's conduct, the magnitude of the potential harm arising from it, and even the defendant's net worth, to assess the probability of deterrence'". *Dekeyser*, 706 So.2d at 687 (quoting *Laris v. Parker, 92-1443* (La.App. 4 Cir 3/29/94), 635 So.2d 442, 444). Thus, Louisiana tort law, as previously determined in this Circuit by the *Dekeyser* decision, does not use a fixed list of exclusive factors to be considered in order to determine whether a punitive

damages award is so great (or small) as to constitute an abuse of discretion.

We do believe, however, that the selection and evaluation of factors to consider in any particular case, and the evaluation of whether or not a particular quantum of punitive damages is an abuse of discretion, must be governed by the three purposes of punitive damages identified in the *Billiot* decision: punishment of the defendant, deterrence of the defendant and others, and incentive to plaintiffs. 645 So.2d at 612-613. The punitive damages should be sufficient in amount to clearly and fully meet the three *Billiot* purposes but should be no more than that amount.

Two of the three examples of factors to consider given in the *Dekeyser* decision, "the defendant's conduct" and "the magnitude of the potential harm" are paralleled in two of the three *BMW* "guideposts" and what we said above as to the "reprehensibility" and "ratio" (of potential harm to punitive damages) *BMW* guideposts is applicable to the question of whether or not the quantum of punitive damages in this case is an abuse of discretion. Thus, those two *Dekeyser* factors strongly suggest that there is no abuse of discretion in the quantum of punitive damages in this case. (The third *BMW* guidepost, comparison to civil and criminal penalties for comparable misconduct, is addressed more narrowly to the question of "prior notice" of large financial consequences to particular misconduct, and thus is peculiar to the Due Process analysis and is inapplicable to the Louisiana tort law abuse of discretion analysis.)

The *Dekeyser* decision also suggests that the net worth of the defendant is a proper factor to be considered "to assess the probability of deterrence". 706 So.2d at 687. We believe net worth is also a proper factor to consider with respect to the effectiveness of punishment. The importance of the defendant's financial situation to the goals of

punishment and deterrence is obvious: What "may be awesome punishment for an impecunious individual defendant [may be] wholly insufficient to influence the behavior of a prosperous corporation". *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 641 (10th Cir.1996) (post-BMW analysis of quantum of punitive damages), cert. denied, 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997). Thus, in order to assess the extent of the punishment and deterrence that will be inflicted by a particular amount of punitive damages, it is necessary to consider the financial situation of the defendant. We note that consideration of the financial situation of the defendant is noted approvingly in *TXO*, 113 S.Ct. at 2722 n. 28, and *Haslip*, 111 S.Ct. at 1045, and does not appear to be excluded by the BMW decision. *Continental Trend, supra.* The question is, in effect, how much will this defendant be punished or deterred by an $850 million punitive damages award? The record reflects that CSX has a net worth of about $4.8 billion. The $850 million punitive damages award is about 18% of CSX's net worth. We do not find that percentage to be an abuse of discretion in this case because we cannot say that 18% is indisputably more than necessary to effectuate the *Billiot* purposes of punishment and deterrence.[4]

Quantum of Compensatory Damages

The three defendants-appellants all argue that the awards of compensatory damages made by the trial court

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[4] The plaintiffs, in their Answer To Appeal, argue that the trial court erred by rejecting the jury's $2.5 billion punitive damages verdict against CSX. We share the trial court's conviction that the $2.5 billion verdict was manifestly excessive. The sum of $2.5 billion is more than necessary to fully effect the three purposes of punitive damages as set out in *Billiot*. We are convinced that punishment beyond what is purposeful is not authorized by Article 2315.3.

(after it rejected all of the jury's verdicts) to the 20 selected plaintiffs are excessive and should be reduced. The defendants-appellants' first argument is that the testimony of two expert witnesses for the plaintiffs, which testimony was introduced to support the reasonableness and extent of the plaintiffs' fear of increased risk of cancer, should have been excluded. In particular, the defendants-appellants argue that, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as adopted by *State v. Foret*, 628 So.2d 1116 (La.1993), the trial court, as the "gatekeeper" with respect to expert testimony, should have excluded the testimony of plaintiffs' experts Dr. Lawrence Miller and Dr. Drew Gouvier.

Dr. Miller is a physician and medical researcher. He testified that the plaintiff class members, including the 20 selected plaintiffs, were at a "small" but "definite" increased risk of cancer as a result of their exposure to butadiene and its breakdown products and burn products following the GATX 55996 fire.

Dr. Miller is a graduate of Harvard Medical School and has been a physician for more than twenty years. He did his internship and residency in Internal Medicine at Massachusetts General Hospital. He also did fellowships in Pulmonary Disease and Critical Medicine at Massachusetts General Hospital. He did a two-year fellowship in Clinical Pharmacology at Tufts University School of Medicine. He received a Master's in Public Health, in toxicology, from the Boston University School of Public Health. He is associated with the Department of Pharmacology and Experimental Therapeutics at Tufts University where he does research on the effects of drugs and other chemicals on the human brain. He teaches part-time at Harvard Medical School and at Tufts University School of Medicine. He has hospital privileges at Massachusetts General Hospital and sees patients on a

weekly basis. He is Board Certified in Internal Medicine, Pulmonary Disease, Critical Medicine and Clinical Pharmacology. He has treated patients for cancer resulting from exposure to butadiene and styrene (styrene is a burn product of butadiene). At the time of the GATX 55996 fire, he was teaching at LSU Medical Center in New Orleans. He was accepted as an expert witness, and testified in court, fourteen times in the twelve years prior to trial in this case.

Dr. Miller testified at length as to the carcinogenic nature of butadiene and its breakdown products and burn products. In the daytime, butadiene breaks down into several other chemicals due to exposure to the sun's ultraviolet rays and, at night, butadiene breaks down into several other chemicals due to interaction with nitrates from automobile exhaust. Butadiene and at least one of its breakdown products are clearly established in the scientific literature as carcinogenic. The Federal Agency for Toxic Substance and Disease Registry, the International Agency for Research In Cancer, and OSHA all classify butadiene as very likely a carcinogen in humans.

The burn products of butadiene (i.e. the chemicals produced by burning butadiene) are even more dangerous. Another expert witness, Dr. Catallo, did a burn test and researched the literature to determine the burn products of butadiene. Dr. Miller testified that several of the chemicals that are burn products of butadiene are known to be "very powerful carcinogens" and that they include one of the most powerful carcinogens ever studied. Dr. Catallo's burn test showed that these carcinogenic chemicals are contained in the soot produced by burning butadiene.

Dr. Miller opined that the members of the plaintiff class had a small but definite increase in their risk of cancer due to their exposure to butadiene and its breakdown products and burn products from GATX 55996. He based his opinion on a

four-part toxicological methodology which includes consideration of: (1) the particular chemicals to which someone is exposed; (2) an estimate of the amount of the chemical to which someone is exposed; (3) the length of time to which someone is exposed to the chemical; and (4) the genetic background of the person exposed to the chemical (although he testified that not much is yet known about this fourth factor).

The defendants-appellants argue that Dr. Miller's methodology in this case was so flawed as to have made his testimony completely inadmissible. However, the only part of Dr. Miller's methodology which they specifically attack is the second (amount of the chemical) factor. They argue that Dr. Miller did not know the "dose" of chemical to which the plaintiffs were exposed.

Dr. Miller did address the question of "dose" in his testimony. He explained that, in toxicology, the "dose" is a matter of both the quantity of the chemical and the length of time to which someone is exposed to the chemical. Dr. Miller testified that exposure to the chemicals involved in this case in a concentration of thousands of parts per million for a period of weeks to months would result in an increased risk of cancer. (He did not testify that lesser exposure necessarily would not result in a greater risk of cancer. There is no known safe exposure level.) Dr. Miller also testified that the members of the plaintiff class, including the 20 selected plaintiffs, were exposed to thousands of parts per million for a period of weeks to months.

Dr. Miller explained that, because chemical concentration measurements are often not taken at the time people are exposed to hazardous chemicals, it is often necessary to estimate the concentrations after the fact. There were several facts upon which Dr. Miller relied as to the concentration of chemicals and period of exposure. A large

quantity, some 30,000 gallons, of butadiene was released or burned into the air. The ignition source of the fire was four-and-a-half blocks away, and the flash point of butadiene is 20,000 parts per million, so the concentration of the butadiene in the atmosphere was at least 20,000 parts per million at a distance of four and-a-half blocks from GATX 55996. Also, the concentration of butadiene in the atmosphere would have been even higher closer to the tank car.

What seems to be of most concern to Dr. Miller was the soot produced by the burning butadiene. Dr. Miller emphasized that this soot contained several extraordinarily powerful carcinogens. This soot, which was carried by the plumes of smoke that shifted in all directions from the burning tank car, was observed in the homes of the plaintiffs and took up to a month to clean up. Dr. Miller testified that, despite ordinary clean-up efforts, the plaintiffs would remain exposed to the carcinogenic soot. The soot remains in air conditioning filters where it is recirculated back into the homes, collects in vacuum cleaners and is blown back into the homes each time the vacuum cleaner is used, and collects in attics and other inaccessible places. Dr. Miller testified that there are "known protocols" to remove carcinogens in these types of situations but that the plaintiffs had not been instructed as to them. The result is that the carcinogenic soot remains in homes indefinitely. Dr. Miller conceded that he could not measure precisely the exposure of the plaintiffs but, he testified, he concluded that the exposure was sufficient to create an increased risk of cancer. Lastly, the defendants' brief cites no expert testimony in rebuttal to Dr. Miller's methodology. The points raised by the defendants with respect to Dr. Miller's methodology were proper ones for cross-examination and for consideration by the jury and

by the trial court as trier of fact, but they do not render Dr. Miller's opinion so unreliable as to be inadmissible.

Dr. Gouvier is a clinical psychologist, a Ph.D., who is a tenured Associate Professor at LSU in Baton Rouge. He also has a private practice in Clinical Psychology, is a licensed clinical psychologist, and sees patients regularly. He is on the boards of editors of several scholarly journals, has extensive publications in peer-reviewed journals and has qualified as an expert witness in federal and state courts on several dozen occasions.

He conducted a study, in the summer and fall of 1988, as to the psychological effects of the GATX 55996 fire on the residents of the neighborhood in the vicinity of the fire. He selected one hundred families, made up of two hundred eighteen individuals, to interview and test. The families were selected using statistical sampling techniques. Among other things, Dr. Gouvier drew three "rings" at a distance of a half-mile, one mile and one-and-a-half miles from the site of the GATX 55996 fire and sampled all three of the areas. He also divided the area into northeast, northwest, southwest and southeast quadrants and sampled all four of those areas. Interviews with and tests of the one hundred selected families were pursued diligently in order to avoid self-selection bias. The result of these procedures, Dr. Gouvier testified, is a sample of the plaintiffs which is representative of the class as a whole.

The one hundred families of two hundred eighteen individuals were interviewed and subjected to a series of standardized psychological tests. These tests included the Zung Depression Inventory, the Anxiety Sensitivity Index and an Anxiety Inventory. He also interviewed and tested a comparison group of new residents who had moved into the neighborhood since the tank car fire and then used statistical analysis to compare the two groups.

The testing of the two hundred eighteen individuals of the plaintiff class revealed that they suffered from increased depression, anxiety and anxiety sensitivity after the GATX 55996 fire. (Dr. Gouvier referred some persons to mental health care providers.) The depression decreased a year after the fire but anxiety remained high. Of the two hundred eighteen individuals, 98.9% had been exposed to smoke or fumes from the fire and 76% had been evacuated. Those further away from the fire were much less likely to have evacuated but they also tended to suffer anxiety about risks they might have incurred due to their lack of evacuation. Dr. Gouvier opined that, based upon studies of other disasters, the increased anxiety among members of the plaintiff class was unlikely to go away by itself for a very long time. Lastly, Dr. Gouvier testified that the findings of his study of the plaintiff class were consistent with studies done in connection with other disasters.

The defendants-appellants make four very brief arguments that Dr. Gouvier's testimony should have been excluded: First, they complain that the twenty selected plaintiffs were not examined by Dr. Gouvier and were not among the two hundred eighteen individuals interviewed and tested. However, Dr. Gouvier was in court for most of the trial and heard all or most of the twenty selected plaintiffs testify. He read proof of claim forms by and heard taped interviews with all of the twenty selected plaintiffs. Second, the defendants-appellants complain that the two-hundred eighteen individuals who were studied by Dr. Gouvier had been told that he was working with the plaintiffs' lawyers in connection with their case. However, this source of possible bias of the two hundred individuals studied was made known to the jury and to the trial court as trier of fact, the two hundred eighteen individuals studied were warned of the anticipated discovery and cross-

examination and the need to be completely truthful, and Dr. Gouvier's interviews and testing included measures to detect fabrications or exaggerations. Third, the defendants-appellants complain that Dr. Gouvier was unable to study a control group of residents of the affected area who were not plaintiffs. However, Dr. Gouvier was able to study a comparison group of persons who moved to the affected area after the GATX 55996 fire. Fourth, the defendants-appellants complain that Dr. Gouvier's study has not been subjected to "formal" peer review. Dr. Gouvier's study in connection with the GATX 55996 fire has not been subjected to "formal" peer review because it has not been submitted for publication. However, it has been subjected to peer review by other professors at LSU who are not connected to the study. Moreover, a similar railroad tank car disaster study performed by the same group at LSU had been published and, presumably, subject to formal peer review. None of these complaints about Dr. Gouvier's testimony, either individually or collectively, amounts to a reason to exclude Dr. Gouvier's testimony (although all were fair game for the vigorous cross-examination to which Dr. Gouvier was subjected before the trial court and jury).

Lastly, we believe that if there was any error in admission of Dr. Gouvier's testimony, it was harmless. The twenty selected plaintiffs testified as to their experiences and their distress. Based upon that testimony, the trial court would almost certainly have concluded that the twenty selected plaintiffs, having been traumatized by the GATX 55996 fire, would tend to suffer short-term depression and long-term anxiety (particularly about the CSX tracks and the tank cars which remain in their neighborhood). The trial court, as finder of fact, is unlikely to have given undue weight to Dr. Gouvier's testimony when setting the amount of compensatory damages.

The defendants-appellants also argue that the trial court, as finder of fact, awarded excessive damages to each of the twenty selected plaintiffs. Almost all of the damages awarded to the twenty selected plaintiffs were general damages for physical pain and suffering, mental anguish and evacuation and inconvenience. Appellate review of general damage awards is quite limited. The trial court, as finder of fact, has "vast discretion" in setting the amount of general damages. E.g., *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). So long as the amount of general damages awarded is not clearly higher (or lower) than reasonable minds could accept, it may not be disturbed upon appeal. We may not look to other cases as to the amount of general damages in the absence of an abuse of discretion by the trier of fact. Id.

The testimony of the twenty selected plaintiffs regarding their experiences varies a fair amount which, no doubt, accounts for the broad range in the amounts of the awards of damages made by the trial court. The amounts of the differences between the jury verdicts (which were rejected by the trial court) and the trial court's awards vary also and, presumably, this reflects the trial court's own observations of the demeanor and credibility of the twenty selected plaintiffs. These factors make it somewhat difficult to generalize about the evidence and the amounts awarded by the trial court. They also highlight the highly subjective nature of general damages and the need to avoid second-guessing the trier of fact in the absence of a clear abuse of discretion.

Nevertheless, a few general themes emerge from the plaintiffs' testimony and bear noting. The sound of an explosion, the sight of flames, the smell of smoke and fumes and the middle-of-the night evacuation combined to produce

fear and confusion which aggravated the fear. The plaintiffs were exposed to chemical fumes which irritated their eyes and respiratory systems and, most of all, made them fearful for their health. Although their fears are not always particularized towards cancer, they have the general sense (correctly) that the chemical exposure they underwent is a threat to their health. The fact that tank cars continue to arrive in the neighborhood is a reminder of the GATX 55996 fire and a source of continued anxiety. The security which one normally feels in one's home has been eroded and that is exhibited by behaviors such as keeping a packed suitcase by the door or sleeping with one's clothes on.

We believe that there was no abuse of discretion by the trial court in its awards of compensatory damages to the twenty selected plaintiffs. The defendants-appellants' concerns that the jury acted out of bias and prejudice in setting the amounts of compensatory damages are obviated because the trial court rejected the jury's verdicts and set the amounts of the compensatory damages itself. While this court, or some other court, may have selected different general damages awards as an original matter, that is not the issue. The trial court's awards of compensatory damages, being within a reasonable range, must be affirmed.[5]

Polysar's Appeal As To Liability

Polysar was assessed 5% of the liability for compensatory damages but found not liable for punitive damages. (The overall assessment of liability for compensatory damages was: Phillips, 20%; GATC, 20%; CSX, 15%; Mitsui, 15%;

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[5] In their Answer To Appeal, the plaintiffs argue that the trial court erred by rejecting the jury verdicts as to compensatory damages and request that the jury verdicts be reinstated. A review of the facts as to the compensatory damages as to each of the twenty selected plaintiffs convinces us that the trial court did not err and that the awards of compensatory damages made by the trial court were fair and reasonable.

AGS, 5%; Illinois Central, 5%; AMF-BRD, 5%; and Polysar, 5%.) Polysar appeals and argues that it should not have been assessed *any* liability.

We will pretermit a number of Polysar's arguments as to jury instructions, standard of review, whether certain regulatory duty issues are ones of law or fact, and admissibility of certain testimony as to regulatory duty issues by conducting a *de novo* review of Polysar's liability. In doing so, we do not hold that the trial court erred in any respect. We are simply giving Polysar every benefit of the doubt so as to simplify the analysis by obviating certain issues raised by Polysar. Also in the interest of simplification, we will base our analysis upon only the plaintiffs' negligence theory and not upon strict liability. In accordance with Polysar's argument, we will analyze the applicability of the relevant federal regulations as an issue of law rather than fact.

Polysar argues that it was "simply awaiting delivery" of the butadiene at the time of the tank car fire. However, it is also true that Polysar: owned the butadiene when it was loaded onto GATX 55996 and at the time of the fire; coordinated the shipment of the butadiene from Good Hope, Louisiana, through New Orleans and on to Chattanooga; paid for that shipment; had the authority to tell Mitsui which tank cars to use; and chose the shipping route through New Orleans. Polysar was not merely a passive recipient of the butadiene but was, instead, an active participant in the transportation of the butadiene. What Polysar did *not* do was make any inspection of GATX 55996 (or the other pressurized tank cars) or take any other actions to determine whether its butadiene was being transported safely. Polysar in effect admits that it did nothing to determine whether the butadiene was being transported safely but contends that it had no duty to do so.

Whether Polysar had a duty with respect to the safety of the transportation of its butadiene is an issue of law which we address *de novo*:

> This court has adopted a duty-risk analysis to determine whether liability exists under the particular facts presented. Under this analysis the plaintiff must prove that the conduct in question was the cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded by the duty breached. *Syrie v. Schilhab*, 96-1027, p. 4-5 (La.5/20/97), 693 So.2d 1173, 1176-77; *Berry v. State*, 93- 2748, p. 4 (La.5/23/94), 637 So.2d 412, 414. Under the duty-risk analysis, all four inquiries must be affirmatively answered for plaintiff to recover. *LeJeune v. Union Pacific R.R.*, 97-1843, p. 6 (La.4/14/98), 712 So.2d 491, 494.
>
> A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. *Meany v. Meany*, 94-0251, p. 6 (La.7/5/94), 639 So.2d 229, 233. Whether a duty is owed is a question of law. *Peterson v. Gibraltar Sav. & Loan*, 98-1601, 98-1609, p. 7 (La.5/18/99), 733 So.2d 1198, 1204; *Mundy v. Dep't of Health & Human Resources*, 620 So.2d 811, 813 (La.1993); *Faucheaux v. Terrebonne Consol. Gov't*, 615 So.2d 289, 292 (La.1993). In deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. See *Socorro v.*

> *City of New Orleans*, 579 So.2d 931, 938 (La.1991). The court may consider various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving. See *Meany*, 639 So.2d at 233; *Pitre v. Opelousas Gen. Hosp.*, 530 So.2d 1151, 1161 (La.1988); *Entrevia v. Hood*, 427 So.2d 1146, 1149 (La.1983).

Posecai v. Wal-Mart Stores, Inc., 99-1222 (La.11/30/99), 752 So.2d 762, 765-66.

The key dispute with respect to Polysar's duty revolves around several federal regulations, which provide as follows:

> *49 C.F.R. § 171.2*(a): *General requirements*: No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of this subchapter (including § § 171.11, 171.12, and 176.11 ...).
>
> *49 C.F.R. § 172.204(a)*: *Shipper's certification*: ...Each person who offers a hazardous material for transportation shall certify that the material is offered for

transportation in accordance with this subchapter by printing...on the shipping paper containing the required shipping description the certification contained in paragraph (a)(1) of this section...[(a) (1)] "This is to certify that the above-named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the Department of Transportation."

49 C.F.R. § 173.1(b): *Purpose and scope*: A shipment of hazardous materials that is not prepared in accordance with this subchapter may not be offered for transportation by air, highway, rail, or water. It is the duty of each person who offers hazardous materials for transportation to instruct each of his officers, agents, and employees having any responsibility for preparing hazardous materials for shipment as to applicable regulations in this subchapter.

49 C.F.R. § 173.31(b)(1): *Loading and Shipping*: When tanks are loaded and prior to shipping, the shipper must determine to the extent practicable, that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading. Tanks with bottom discharge outlets must have their outlet caps off, or outlet cap plugs open, during the entire time tanks are being loaded. After loading, tanks...which permit more than a dropping of the liquid with the outlet caps off...must not be offered

> for transportation until proper repairs have been made. Tanks which show any dropping or leaking of liquid contents at seams or rivets, must not be offered for transportation until proper repairs are made.
>
> *49 C.F.R. § 173.31(b)(3): Securing closures*: All closures of openings in tank cars and of their protective housings must be properly secured in place by the use of a bar, wrench or other suitable tool...Manway covers...must be made tight against leakage of vapor and liquid, by use of gaskets of suitable materials, before cars are tendered to carrier for transportation...all closures of openings in tank cars must be inspected to the extent practical for corrosion of or damage to the gasket seating surface and for serviceability of packing, gaskets, and hold-down bolts. All defective packing, gaskets, bolting or threaded elements must be replaced.

These regulations, promulgated by the federal Department of Transportation, do not create any private right of action for damages. Any claim for damages in this case arises under Louisiana tort law. However, public safety regulations such as these, issued by an agency presumed to have expertise in the relevant subject matter and statutorily-charged with protecting public safety, are very useful in determining the standard of care applicable in a negligence action (i.e. defining the "duty" that is owed by someone).

It is undisputed that GATX 55996 did not comply with the above-quoted regulations, and that the required documentation applicable to GATX 55996 was incorrect, at the time Polysar's butadiene was loaded onto GATX 55996

and at the time of the fire. Polysar's position is that the federal regulations are not applicable to Polysar. Polysar's argument is as follows: The regulations apply only to a "shipper", the regulations do not define "shipper" but, in the present case, Mitsui, and not Polysar, is the "shipper". We disagree with Polysar's initial proposition. The federal regulations quoted above do not state that, as a group, they are applicable only to a "shipper" (whatever a "shipper" is). Section 171.2(a) applies to any "person [who] may offer or accept a hazardous material for transportation in commerce". This seems as applicable to Polysar, whose butadiene was being transported, as it is to Mitsui. Section 172.204(a) applies to "[e]ach person who offers a hazardous material for transportation". This seems more applicable to Polysar, whose butadiene was being transported, than to Mitsui. Section 173.1(b) applies to "each person who offers hazardous materials for transportation". Again, this seems to apply more to Polysar, whose butadiene was being transported, than to Mitsui. Section 173.31(b)(1) refers to the "shipper" without specifying what is a "shipper". This could apply to either Polysar, the owner of the butadiene seeking to have it transported, or to Mitsui, the party supplying the tank cars to carry the butadiene. Section 173.31(b)(3) says nothing as to whom it is applicable.

Our interpretation of these federal regulations is that they are applicable to, and thus impose duties upon, both Polysar and Mitsui. Because of the importance of those duties to the public safety, we view those duties as non-delegable as a matter of Louisiana tort law. (Thus, whether Mitsui is an "independent contractor" to Polysar is of no moment.) The result is that Polysar (along with Mitsui) had a duty, as a matter of Louisiana tort law, to exercise the degree of care specified in the federal regulations. Polysar's acknowledged failure to meet the standard of care specified

in the federal regulations mandates the finding that Polysar was negligent.

AMF-BRD's Appeal As To Liability

AMF-BRD was held liable for 5% of the compensatory damages but was held not liable for punitive damages. AMF-BRD argues that it should not have been held liable at all or, in the alternative, some of its 5% share of liability should have been assigned to NACC. AMF-BRD also argues that, because certain jury charges it requested were not given, the issue of its liability should be reviewed de novo on appeal.

We will review de novo the issue of AMF-BRD's liability. We will do so not because we decide that the trial court erred, but in order to simplify the analysis and give AMF-BRD every possible benefit of the doubt.

AMF-BRD argues that NACC, not AMF-BRD, was at fault. AMF-BRD manufactured the pressure tank which NACC then placed on the GATX 55996 rail car chassis. AMF- BRD notes that it was NACC that specified a bottom manway for the tank. Thus, AMF-BRD argues, it was not at fault with respect to the design of the rail car.

However, we do not believe that specification of a bottom manway is what is most important as to the causation of the leak and fire. It was established at trial that only an asbestos gasket should ever have been used with the GATX 55996 bottom manway and, if the asbestos gasket had not been replaced by Phillips with a rubber gasket, then the leak and fire would not have occurred. Thus, the key issue with respect to the liability of AMF-BRD is the failure of AMF-BRD to stencil or otherwise place a warning on the bottom manway advising that only an asbestos gasket should be used.

AMF-BRD argues that it did, in effect, give such a warning because the specifications and drawings which it supplied to NACC provided for an asbestos gasket. However, for a piece of equipment such as a rail car, which is likely to remain in service for many years, which may well change hands over the years, and which will undergo periodic maintenance and repair and perhaps modification, the specificationsand drawings delivered to the original owner are no substitute for a warning appearing on the piece of equipment itself.

AMF-BRD also argues that the GATX 55996 rail car was intended to be used by sophisticated users and, therefore, there was no need for AMF-BRD to provide any warning. However, while intended use by sophisticated users might weigh against the need for a warning in some circumstances (at least prior to the enactment of the Louisiana Products Liability Act), we do not believe that it obviates the need for a warning when there is a grave and substantial risk to the public safety at stake. In view of the great risk presented to the public at large from a leak in a chemical tank car, the fact that GATX 55996 was intended to be used by professional rail shippers or railroads does not eliminate the need for an adequate warning. In that connection, we note that AMF-BRD, as the designer of the hatch mechanism which closed the manway, had greatly superior knowledge of the critical need for an asbestos gasket, and thus should have been well aware of the need for a warning as to the gasket.

AMF-BRD further argues that, when it placed the designation "114A" on each end of the tank, it provided a warning to use an asbestos gasket. However, what the designation "114A" actually calls for is an asbestos gasket or an approved high pressure temperature-resistant equivalent. Thus, the "114A" designation relates to pressure and temperature. In the present case, the problems with

substituting a rubber gasket for an asbestos gasket result from the fact that a rubber gasket could be displaced (apparently because rubber gaskets are less rigid than asbestos gaskets) and because rubber gaskets, unlike asbestos gaskets, can react with butadiene so as to develop leaks. In any event, in light of the critical nature of the need for an asbestos gasket, and the potential for great danger to the public, the designation "114A" on the ends of the tank was not a substitute for an express warning on the manway to use only asbestos gaskets.

Lastly, AMF-BRD argues that prudent maintenance of the rail car would have called for substitution of parts of like kind, i.e., an asbestos gasket for an asbestos gasket. However, designation "114A" contemplates the possibility of substitution with a non-asbestos gasket. Moreover, in view of the critical need for an asbestos gasket and the potential for danger to the public, it should not be simply assumed that only an asbestos gasket will be installed during periodic maintenance. There should be an express warning to use only an asbestos gasket. We do not mean to suggest that AMF-BRD's negligence is equivalent to the fault of Phillips. However, the 20% allocation of fault to Phillips was four times the 5% allocation of fault to AMF-BRD, and that seems perfectly reasonable. We believe the allocation of a small percentage of the liability for compensatory damages to AMF-BRD, 5%, is appropriate.

Interest on Punitive Damages

The trial court awarded prejudgment interest on the compensatory damages and interest from the date of judgment on the punitive damages. The plaintiffs, by their Answer To Appeal, argue that the trial court erred by not awarding prejudgment interest on the punitive damages. Based upon the limited available authority from the

Louisiana Supreme Court, we believe that the trial court did not err.

In *Jordan v. Intercontinental Bulktank Corp.*, 621 So.2d 1141 (La.App. 1st Cir.), writ denied, 623 So.2d 1335, 1336 (La.1993), cert. denied, 510 U.S. 1094, 114 S.Ct. 926-27, 127 L.Ed.2d 219 (1994), it was held:

The trial court also erred in awarding prejudgment interest on the punitive damages award. Under both Louisiana and federal law, a plaintiff is entitled to interest on punitive damages only from date of judgment. *Alexander v. Burroughs Corp.*, 359 So.2d 607, 613-614 *(La.1978); Malbrough v. Wallace*, 594 So.2d 428, 438 (La.App. 1st Cir.1991), writ denied, 596 So.2d 196 (La.1992); United States v. Reul, 959 F.2d 1572 (Fed.Cir.1992); Wickham Contracting Co. v. Local Union No. 3, 955 F.2d 831 (2d Cir.1992).

621 So.2d at 1158.

Later, in *Sharbono v. Steve Lang & Son Loggers*, 97-0110 (La.7/1/97), 696 So.2d 1382, the Louisiana Supreme Court, in holding that interest on penalties in worker's compensation cases runs only from the date of judgment, cited the Jordan decision with apparent approval:

> Finally, there is the matter of interest on penalties. Both federal and state jurisprudence is nearly uniform in holding that penalty interest is entirely of the post-judgment variety, and thus is calculated only from the date the penalties are awarded until the date they are paid. E.g., United States v. Reul, 959 F.2d 1572 (Fed.Cir.1992) ("Prejudgment interest may not be awarded on punitive damages."); *Jordan v. Intercontinental Bulktank Corp.*, 621 So.2d

> 1141 (La.Ct.App. 1st Cir.1993), cert. denied, 510 U.S. 1094, 114 S.Ct. 926, 127 L.Ed.2d 219 (1994) ("Under both Louisiana and federal law, a plaintiff is entitled to interest on punitive damages only from date of judgment."), citing Alexander, 359 So.2d at 613-14.

696 So.2d at 1389. From this, we believe it most likely that the Louisiana Supreme Court adopted the Jordan rule that prejudgment interest is not to be applied to punitive damages. See also *Owens v. Anderson*, 93-1566 (La.App. 4 Cir. 1/27/94), 631 So.2d 1313, writ denied, 94-0462, 94-0494 (La.4/7/94), 635 So.2d 1135 (rendering decree with prejudgment interest on compensatory damages and with interest from date of judgment on punitive damages). The plaintiffs cite *Demarest v. Progressive American Ins. Co.*, 552 So.2d 1329 (La.App. 5th Cir.1989), but that case predates both Sharbono and Jordan and relies upon much earlier decisions awarding prejudgment interest on penalties and attorney's fees, 552 So.2d at 1338-39.

For the foregoing reasons, we affirm the judgment of the trial court. We also remand this case to the trial court for proceedings as to the question of compensatory damages with respect to the remaining class members and for any other proceedings as are necessary to conclude this action.

AFFIRMED. CASE REMANDED FOR FURTHER PROCEEDINGS.

795 So.2d 364, 2000-0479 (La.App. 4 Cir. 6/27/01)

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

In re NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION.

No. 2000-CA-0479.

Aug. 1, 2001.

Appeal from Civil District Court, Orleans Parish No. 87-16374, Division "Ad Hoc-B", Honorable Wallace A. Edwards, Judge Ad Hoc.

ON APPLICATION FOR REHEARING

JOAN BERNARD ARMSTRONG, Judge.

The application for rehearing of Nova Chemicals, Inc. ("Polysar") is denied. The duty and liability of Polysar was not determined solely by the ownership of the butadiene, or by any other single factor, but by the several factors discussed in our opinion on original hearing.

794 So.2d 956, 2000-0479 (La.App. 4 Cir. 8/1/01)

SUPREME COURT OF LOUISIANA

In re NEW ORLEANS CAR LEAKAGE FIRE LITIGATION

No. 2001-C-2492

Oct. 14, 2002

Prior report: La.App., 795 So.2d 364

In re AMF/BRD Inc.;–Defendant; Applying for Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. B, No. 87-16374; to the Court of Appeal, Fourth Circuit, No. 2000-CA-0479.

Denied.

VICTORY, J., would grant the writ.

TRAYLOR, J., would grant the writ.

WEIMER, J., would grant the writ.

827 So.2d 411, 2001-2492 (La. 10/14/02)

STATUTORY PROVISIONS

TITLE 49 –APPENDIX. TRANSPORTATION

CHAPTER 27—HAZARDOUS MATERIALS TRANSPORTATION

NOTE (1993)

(Congressional Findings: 1990 Amendment)

(Quoting Pub. L. No. 101-615, § 2, 104 Stat. 3244, 3245 (Nov. 16, 1990))

§ 1801. Congressional Declaration of Policy.

* * *

"(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

"(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

"(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable."

"(6) in order to provide reasonable, adequate, and cost-effective protection from the risks posed by the transportation of hazardous materials, a network of

adequately trained State and local emergency response personnel is required,

"(7) the Office of Technology Assessment has estimated that approximately 1,500,000 emergency response personnel need better basic or advanced training for responding to the unintentional release of hazardous materials at fixed facilities and in transportation, and

"(8) the movement of hazardous materials in commerce is necessary and desirable to maintain economic vitality and meet consumer demands, and shall be conducted in a safe and efficient manner."

* * *

TITLE 49 –APPENDIX. TRANSPORTATION
CHAPTER 27—HAZARDOUS MATERIALS TRANSPORTATION
(1990)

§ 1811. Relationship to other laws

(a) General

Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

(b) State laws

Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

(c) Other federal laws

The provisions of this chapter shall not apply to pipelines which are subject to regulation under the Natural Gas Pipeline Safety Act of 1968 (section 1671 et seq. of this title) or to pipelines which are subject to regulation

under Hazardous Liquid Pipeline Safety Act of 1979 [49 U.S.C.A. § 2001 et seq.].

(Pub.L. 93-633, Title I, § 112, Jan. 3, 1975, 88 Stat. 2161.)

(As amended Pub.L. 96-129, Title II, § 216(a), Nov. 30, 1979, 93 Stat. 1015.)

TITLE 49. TRANSPORTATION
SUBTITLE III—GENERAL AND INTERMODAL PROGRAMS
CHAPTER 51—TRANSPORTATION OF HAZARDOUS MATERIAL

§ 5125. Preemption

(a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if–

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) Substantive differences.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents ....

* * *

ARTICLE I–THE CONGRESS

Section 8, Clause 3. Regulation of Commerce

The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Supreme Court, U.S.
FILED
FEB 27 2003

No. 02-1067

In The Supreme Court of the United States

NOVA CHEMICALS INC.,

Petitioner,

v.

LEONARD ADAMS, MICHAEL NOAL, VIRGINIA PHILLIPS, DEBRA BLACK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

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QUESTIONS PRESENTED

I. On the basis of the state court record, and as a matter of fact, whether in this case Polysar effectively discharged by delegation all the duties imposed on it by existing federal regulations pertaining to assurances that the tank car, in which its hazardous product was loaded, was safe for transportation.

II. Whether the constitutional issue of imposing a burden on interstate commerce was sufficiently asserted and pursued in the state court proceedings before the contested decision of the state court of appeal was handed down.

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RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, being the Representatives of the Class of plaintiffs in this Class Action, appearing herein through the Plaintiffs' Legal Committee on behalf of the Representatives and the Class, and pursuant to Rule 15 of this Court, respectfully present this opposition to the petition for a writ of certiorari filed on behalf of NOVA Chemicals, Inc. (herein "Polysar") to review the decree of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPINIONS BELOW

Petitioner has correctly identified and attached to its Appendix the decision of the Louisiana Fourth Circuit (Pet. App. 1a-57a) and the order of the Louisiana Supreme Court denying Polysar's application for review (*id.* at 58a), thus making the judgment of the Louisiana Fourth Circuit final and executory. However, in order to demonstrate the procedural history of this case, particularly with regard to Polysar's prior effort to obtain summary judgment as a matter of law with regard to its status and responsibility for the tank car, Respondents attach to their Appendix the opinion of the Louisiana Fourth Circuit Court of Appeal handed down on March 20, 1996 and reported at 671 So.2d 540 (Resp. App. 1a-20a), affirming the district court's denial of Polysar's motion for summary judgment as to federal preemption of punitive damages, and for denial of Polysar's motion for summary judgment on punitive damages due to a lack of status. Under Louisiana law in effect at the time of the incident, a defendant liable for compensatory damages could also be held liable for punitive damages if its conduct met certain criteria, and it had

the required status of a person engaged in the storage, handling or transportation of a hazardous substance. In addition to preemption, Polysar argued that it lacked the requisite status for exemplary damages liability because even though it owned the hazardous commodity it had contracted with Mitsui for the chemical's storage, handling, and transportation. Mitsui, of course, argued that Polysar as the owner of the hazardous chemical was the shipper and ultimately responsible for its storage, handling and transportation. The Louisiana Fourth Circuit Court of Appeal, finding the existence of material facts at issue, disagreed with both arguments and held that Mitsui could be subject to exemplary damages "[i]f Polysar proves at trial that Mitsui was responsible for the shipping. . . . " 671 So.2d 540, 548, and similarly "Polysar could have some liability for . . . exemplary damages, if Mitsui proves that it was responsible for the shipping. . . . " *Id.* CSX Transportation, the Illinois Central Railroad, Polysar, and Mitsui applied for review in the Louisiana Supreme Court, all of which applications were denied, 675 So.2d 1121 (La.1996). From this decision only CSX Transportation, Inc., applied to this Court for certiorari, which was denied. *CSX Transportation, Inv. v. Leonard Adams, et al.*, 117 S.Ct. 512 (Mem.), 519 U.S. 1009, 136 L.Ed.2d 402 (1996).[1]

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[1] It is not contended that the memorandum decision of this Court is precedential, authoritative or persuasive since no reasons were given therefor. Its relevance is offered only as a reply to the projected aftermath suggested by Petitioner as an invitation to the Court to immediately intervene [Sup. Ct. Rule 10(e)] and disregard the last paragraph of Sup. Ct. Rule 10.

JURISDICTION

The first question proposed by Petitioner as a basis for this Court's jurisdiction is stated in the Petition to be 28 U.S.C. §1257(a),which is subject to the exercise of this Court's discretion under its Rule 10 which generally eschews exercise of that discretion "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" as provided in the last paragraph thereof. As will be reflected below, the defining basis for Polysar's Petition rests on disputed factual findings which were resolved by the jury and affirmed by the court of appeal on *de novo* review in the face of Polysar's trial and appellate court challenges, which may account for the recurring suggestions in its Petition that this Court should consult with the Solicitor General in deciding whether to exercise its discretion.

The second question proposed by Petitioner presents the issue of whether the action of the court of appeal "imposes an excessive and unconstitutional burden on interstate commerce," thus injecting a fact-based constitutional issue which was not pursued by Polysar until after the court of appeal had handed down its decision. This Court has previously held, as well settled, that this Court will not review a final judgment of a state court "unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary International, et al. v. Rotary Club of Duarte, et al.,* 481 U.S. 537, 549-550, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). Noting that the appellants in that case did not present the issues squarely until they filed their petition for rehearing with the court of appeal, this Court followed its previous decisions that when "the highest state court has failed to

pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Id.* 481 U.S. at 550, citing *Exxon Corp. v. Eggerton*, 462 U.S. 176, 181, n. 3, 103 S.Ct. 2296, 2123, n. 4, 76 L.Ed.2d 497 (1983). These rulings appear embodied in Rule 14(1)(g). No such showing appears in the Petition.

STATEMENT OF THE CASE

This class action arose from the release and ignition of butadiene inhibited owned by Polysar, emanating from the defective bottom manway of a railroad car situated on tracks of the CSX interchange yard in the City of New Orleans, Louisiana, over fifteen years ago on September 9, 1987. The leakage of this chemical, a highly flammable and known carcinogen, resulted in heavier than air vapors spreading along the ground, eventually coming into contact with an open flame and igniting. (Tr. 2532-33). It is undisputed that the leakage was caused by a defective gasket in the bottom manway and that the tank car was inappropriate for the storage and transportation of butadiene inhibited. The ensuing fire and threatened explosion of the tank car lasted for one and a half days, resulting in personal injury as well as the evacuation, inconvenience and fear of thousands of area residents. Many were immediately evacuated from their homes in the middle of the night; others were ordered evacuated by city officials when the endangered area was enlarged due to threatened explosions. All were exposed to the carcinogenic by-products of the burning chemical, resulting in months, and in some cases years, of dealing with the physical and

emotional damage resulting from the chemical release. Thus formed the basis for this litigation initiated in 1987.

The procedural history of this class action and the facts established in the record and reviewed *de novo* on appeal are concisely set forth in the opinion of the Louisiana Fourth Circuit Court of Appeal opinion at Pet. App. 1a-7a, which portion is adopted and made part of this Statement of the Case for purposes of brevity, since the Court will have read the opinion in the course of its consideration of the Petition. This procedural history is amplified by the inclusion of the opinion of the Louisiana Fourth Circuit Court of Appeal referred to in the foregoing "Opinions Below" and attached to this Opposition as Resp. App. 1a-20a.

The original verdict on compensatory damages apportioned compensatory fault of 5% to AMF-BRD, manufacturer of the tank car; 20% to Phillips Petroleum Company, retrofitter of the tank car; 20% to General American Transportation Company, owner of the tank car; 10% to GATC Terminals, which inspected the tank car; 15% to Mitsui (USA), Inc., lessee of the tank car; 5% to Polysar, owner of the butadiene loaded in the tank car; 5% to Illinois Central Railroad Company, which picked up the tank car at the place of loading; 5% to Alabama Great Southern, which transported the tank car to the Gentilly interchange yard in New Orleans, Louisiana; and 15% to CSX Transportation, Inc., which owned and operated the Gentilly interchange.

As recounted in the court of appeal's opinion (Pet. App. 6a-7a), prior to the completion of the proceedings in state district court the claims in the action were settled with all defendants except CSX, AMF-BRD and Polysar.

On appeal with regard to Polysar, only its liability for compensatory damages was reviewed since the punitive damage claim against Polysar had been dismissed in the trial court. At Polysar's request, the court of appeal conducted a *de novo* review of the factual evidence in order to reach conclusions of law, restricting the scope of review to whether there was sufficient evidence of negligence on the part of Polysar to support the judgment against it. (Pet. App. 47a.) The court of appeal based its findings as to Polysar's negligence on the basis of the standard of care derived from quoted applicable federal regulations. (Pet. App. 48a-51a.) After its *de novo* review of the evidence in the light of the federal regulations the court of appeal concluded that "Polysar's acknowledged failure to meet the standard of care in the federal regulations mandates the finding that Polysar was negligent." (Pet. App. 52a-53a.) Accordingly, the trial court judgment against Polysar for compensatory damages was affirmed.

REASONS WHY THE PETITION SHOULD BE DENIED

All issues of negligence liability in this case were based on the standard of care derived from applicable federal regulations. Clearly, under the HMTA Regulations, relied upon by the court of appeal to establish the standard of care in the transportation of hazardous materials (Pet. App. 49a-51a), one or more of the parties involved in the shipping aspects of this transaction had the duty or duties to assure that the shipment was safe for transportation of this particular hazardous material, *i.e.*, butadiene inhibited. Yet admittedly *none* of the defendants (GATX, Mitsui and Polysar) involved in the loading and shipment

of this particular hazardous commodity knew or even suspected that there was a bottom manway in Tank Car 55996; nonetheless that it was equipped with a silicone gasket which was susceptible to immediate deterioration, causing leakage when exposed to butadiene, as opposed to the required asbestos gasket. (Tr. 3076.) Accordingly, *none* of them inspected the manway as required by the regulations. (Pet. App. 50a-51a; GATX, Tr. 3071, 3079; Mitsui, Tr. 2625-16, 2618, 2620; Polysar, Tr. 2518.)

Polysar's position in its Petition is that it had no obligation under the applicable federal regulations, and thus should not be liable for the failure to assure that it was safe for the transportation of a hazardous substance, because it had relied on Mitsui, the provider of the tank car, to make that assurance. However, Polysar did not prove as a matter of fact that any such complete delegation had taken place in this particular case. Since delegation of duty is an affirmative defense under Louisiana law as an extinguishment of its obligation, LSA-C.C.P. art. 1005, the burden was thus placed upon Polysar to prove the facts supporting its defense by a preponderance of the evidence. *Allvend, Inc. v. Payphone Commissions Company, Inc.,* 804 So.2d 27, 30 (La. App. 4 Cir. 2001) ("The party pleading an affirmative defense has the burden of proving it by a preponderance of the evidence."). Polysar did not discharge its burden, and thereby became subject to liability under the negligence duty/risk analysis employed by the Louisiana court of appeal. (Pet. App. 48a-49a).

Instead, Polysar represents in its Petition that it had a long-standing arrangement with Mitsui for the loading and transportation of the butadiene needed in the manufacture of latex by Polysar whereby the duties and

responsibilities of each developed as a matter of custom or practice in domestic shipments. (Tr. 2455.) Polysar argues that events leading up to the loading of this particular shipment of butadiene were in accordance with those usual and customary practices. The peculiar facts of this case, however, belie this argument. Admittedly, this case was different from the others. (Tr. 2455.) It was only one of two instances in which foreign shipments were involved (Tr. 2457) and the first in which Mitsui "loaned" cars to Polysar as a business favor (Tr. 2510-11) to assist Polysar on a one-time basis (Tr. 2657, 2659-60) with immediate relief of a shortage of butadiene from domestic sources. (Tr. 2456-58.) The existence of the terms of a "contract" for this particular transaction consisted only of telexes relating to the quantity and movement of shipment. (Tr. 2467-68, 2507-08.) The question of which was the "shipper" and should have been denominated as such in the bill of lading under the peculiar circumstances of this case was a bone of serious contention between Polysar and Mitsui from the inception of the case and persisted throughout the trial, each insisting the other was the shipper (Tr. 2477, 2486, 2709, 2727, 2731-32), resulting in the jury's conclusion that both were liable. (Tr. 7391.) Unable to resolve these issues of disputed fact on *de novo* review, the court of appeal found there was sufficient evidence to inculpate both. (Pet. App. 52a). Unfortunately for all concerned, the details for completion of this hurried transaction were simply not worked out to the point where an effective delegation of responsibility for compliance with the federal regulations was assured.

This may perhaps have been due to the lack of any definition of "shipper" in the applicable regulations in effect at the time of this incident in 1987, prior to DOT's

Notice No. 90-2, Formal Interpretation of Regulations Issued Under HMTA, 55 Fed. Reg. 6758 (Feb. 26, 1990) referred to in the Petition (Pet. 9), incorporating previous interpretations, including Int. No. 88-1-RSPA, issued on May 16, 1988, at the request of National Tank Car Carriers, Inc. (*Id.* at 6760-61). As noted in 88-1-RSPA, at pages 4-5:

> The word "shipper" is not specifically defined in HMR (49 CFR parts 170-179), due primarily to the fact that it is not possible for the Department to account for the numerous commercial arrangements that may exist under that concept. Although the word "shipper" does appear, it is used in an ordinary layman's manner rather than as a specific, technical term of art. Consequently, responsibilities generally are placed on "offerors" for performance of the functions associated with "offering" hazardous materials for transportation (e.g., see the general duty and applicability of provisions in §§ 171.1, 171.2, 172.3 and 173.1).
>
> The key issue in determining the regulatory responsibilities in parts 171, 172, and 173 is determining which parties perform which functions. This involves a case-by-case determination based upon all relevant facts. Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise, responsible to perform, any of the functions assigned by the HMR [Hazardous Materials Regulations] to the offeror, is legally responsible under the HMR for the proper performance of those functions. Any person's responsibility for performance of any "offeror" functions may be evidence of that person's responsibility for performance of other "offeror" functions. *In many*

> *cases, more than one person may be responsible for performing, or attempting to perform, "offeror" functions, and each such person may be held jointly and severally accountable for all or some of the "offeror" responsibilities under the HMR,* (Note that responsibilities for compliance may be expressed in terms other than 'offer' or 'offering' (e.g., preparers of hazardous materials for shipment, § 173.1(a)(2), and other persons performing required functions § 173.1(c)).) *(Emphasis and bracketed reference supplied.)*

Such an interpretation alone should have placed all parties involved in the shipment of such a hazardous substance as butadiene on notice of the need to be aware of these regulations and take steps to assure that they were complied with, either directly or through effective delegation. There is no room for loose ends. However, in 1987, when the arrangements were being made for the acquisition, loading and transportation of this butadiene, and when this class action was instituted, all of which took place *prior to DOT's interpretation in 1988*, one could not be certain of his status with regard to compliance with the federal regulations applicable to this particular transaction; some were not even aware of the regulations. For example, Mrs. Dunn, the Production Services Supervisor for Polysar at the time (Tr. 2450), who coordinated the arrangements with Mitsui with regard to this particular shipment of butadiene (Tr. 2451), was admittedly unfamiliar with any applicable federal regulations (Tr. 2478-79), interpreting "shipper" to mean "someone that ships a product to you" (Tr. 2476) and thereby assumes the obligation of compliance with all federal regulations (Tr. 2477-78). Cole Conroy, Mitsui's chemical department traffic coordinator (Tr. 2609), who was in charge of the company's

movement of butadiene (Tr. 2688) and who was charged with the responsibility of familiarizing himself with those regulations (Tr. 2688-89), testified that he believes the shipper is the owner of the cargo (Tr. 2709), and that Polysar, as owner of the butadiene, had responsibility with regard to inspecting, packaging, loading, etc. (Tr. 2710-11.) To further amplify the state of confusion within the industry regarding a company's status and responsibility, Mr. Conroy testified that all of Mitsui's butadiene is transferred FOB meaning that once it is in the tankcar Mitsui no longer owns it (Tr. 2730), and that as a result Mitsui is technically *never* the shipper. (Tr. 2731.)

Pretermitting whether Notice No. 90-2 (1990) and Int. No. 88-1-RSPA (1988) apply to this incident, which occurred in 1987, the "functional" test therein promulgated affords Polysar no relief. Rather, they underscore the necessity for consideration of relevant facts in the particular case, most if not all of which were put before the jury and reviewed *de novo* by the court of appeal in this case in an effort to resolve them, *i.e.,* "ownership of the materials, functions performed or undertaken by the parties, past practices of the parties, and contractual arrangements among the parties."

The factual findings determined *de novo* by the court of appeal in this case support the logical conclusion of the court of appeal that GATX, Polysar and Mitsui each played relevant parts in varying degrees of responsibility for compliance with the federal regulations in the inspection and loading of the tank car in this particular case and that the corresponding apportionment of fault on those issues by the trial jury as to the party before the court on appeal, Polysar, to the extent of 5% as opposed to 15% to Mitsui

and 10% to GATX Terminal, both of which had settled and were not before the court of appeal, was appropriate.

As shown above, and reflected in the opinion of the court of appeal, in this particular case loose ends dangled in every direction, with the result that an improper pressurized tank car with a defective bottom manway, carrying a leaking load of volatile, flammable and carcinogenic material, was a time bomb from the time it was loaded until the heavier than air vapors reached an ignition source and exploded in a heavily-populated neighborhood. There were abundant facts to support the conclusion that each party who contributed to this scenario, even to the extent of 5%, should be required to respond in damages.

With regard to the appellate court's imposition of a non-delegable duty on Polysar, the issue is moot on both counts, including the contention that it imposes an unconstitutional burden on interstate commerce, in view of the fact that the court of appeal had made sufficient findings to support the establishment of an independent duty imposed by the federal regulations on Polysar's part, which could form the basis for culpable fault. The court of appeal's reference to the duty being non-delegable was not necessary to impose liability on Polysar where it was shown that Polysar had taken an active part in the details of the transaction which directly imposed on it the obligations of a shipper under the applicable federal regulations with which Polysar failed to comply.

CONCLUSION

Under the peculiar circumstances of this case, Polysar's Petition for Certiorari should be denied. First, the

basis for the Petition rests on highly contested facts which prevented Polysar from sustaining its burden of proving the complete transfer of its regulatory duties to other parties. Even if the findings of the court of appeal with regard to the essential facts are erroneous, the Petition fails to pass muster for review by this Court under its Rule 10.

Second, the effort of Petitioner to inject the constitutional issue relative to the Commerce Clause after the court of appeal opinion had been handed down, should be rejected as untimely in accordance with previous rulings of this Court.

Respectfully submitted,

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671 So.2d 540

Court of Appeal of Louisiana,
Fourth Circuit.

In re NEW ORLEANS TRAIN CAR
LEAKAGE FIRE LITIGATION.

Nos. 95-C-2710, 95-C-2721, 95-C-2734, 95-C-2797, 95-C-2811, 96-C-0015, 96-C-0016 and 96-C-0017.

March 20, 1996.
Rehearing Denied April 24, 1996.
Writ Denied June 28, 1996.

On Certiorari Civil District Court, for the Parish of Orleans No. 87-16374, Division "B"; Honorable Robert A. Katz, Judge.

Before *BYRNES, LOBRANO* and *PLOTKIN*, JJ.

PLOTKIN, Judge.

The instant consolidated writ applications were filed by eight individual defendants in a class action suit arising from a September 9, 1987 incident in a heavily-populated area of New Orleans East involving an explosion and fire caused by a leaking railroad tank car containing butadiene. The defendants seek review of two trial court judgments denying motions for summary judgment concerning the claims asserted by the class action plaintiffs under the provisions of La.C.C. 2315.3, relative to exemplary damages for "wanton and reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances," other than electricity. Three of the defendants who filed writ applications claim that the La.C.C. art. 2315.3 claims are preempted by federal law. All eight of the defendants claim that they cannot be liable under La.C.C. art. 2315.3 because of

"status" issues; in other words, the defendants claim that the evidence presented in the trial on the motion for summary judgment establishes that they are entitled to judgment as a matter of law because it shows that they were not involved in the "storage, handling or transportation" of the butadiene at the time of the accident, as required for liability under La.C.C. 2315.3. We granted certiorari on all issues.

Facts

The plaintiffs allege that the leak and resultant fire in the instant case was caused by a defective or improperly-installed gasket on the tank car in question. The tank car started leaking butadiene, which was eventually ignited by an outside source, possibly a pilot light on an external water heater, plaintiffs claim. The Plaintiff Management Committee for the class action plaintiffs included the following entities as defendants: CSX Transportation [hereinafter "CSX"]; Illinois Central Railroad Co. ["Illinois Central"]; Novacor Chemicals, Inc. (formerly Polysar, Ltd.) and Polysar, Ltd. [hereinafter "Polysar"]; General American Transportation Corp. [hereinafter "GATC"]; Mitsui and Co. (U.S.A.), Inc. [hereinafter "Mitsui"]; AMF-BRD, Inc. [hereinafter "AMF-BRD"]; New Orleans Terminal Company [hereinafter "NOTC"]; and Phillips Petroleum Co. and Phillips 66 Co. [hereinafter "Phillips"]. The activities allegedly performed by each of these defendants in relation to the tank car are summarized below.

AMF-BRD: The tank portion of the tank car involved in the fire was manufactured by AMF-BRD in 1966, and the tank car was assembled by North American Car

Corporation (now defunct), also in 1966. North American sold the tank car to Phillips in September of 1979.

Phillips: While in the possession of Phillips, the tank car underwent maintenance involving the allegedly-defective gasket on three different occasions. In November of 1981, Phillips installed an asbestos gasket in the tank's bottom manway closure. During repair and maintenance in November of 1984, Phillips replaced the asbestos gasket with a rubber gasket. In November of 1986, the tank car again underwent maintenance work. On this third occasion, the rubber gasket in the bottom manway closure was removed. The same gasket was reinstalled, using a silicone sealant to insure a proper fit. Phillips sold the tank car to GATC in December of 1986 "as is, where is."

GATC: At the time of the accident, GATC owned the tank car in question. In February of 1987, GATC leased the tank car to Mitsui.

Mitsui: In September of 1987, Mitsui loaned the tank car to Polysar as a "business favor." The tank car was to be used to transport a shipment of butadiene from Goodhope, Louisiana, to Chattanooga, Tennessee.

Polysar: At Polysar's request, Mitsui arranged with GATX Terminals, Inc. [hereinafter "GATX"] for the offloading of 154,530 pounds of butadiene from the M/V Herman Schulte into the tank car at GATX's terminal facilities at Goodhope. The butadiene, which was purchased by Polysar overseas, was loaded into the tank car on September 4, 1987.

Illinois Central: After the tank car was loaded, it was transferred to Illinois Central, which transported the tank

car to Jefferson Parish where it was turned over to New Orleans Terminal Company.

NOTC: NOTC delivered the tank car to CSX's interchange track in New Orleans at approximately 7:25 p.m. on September 8, 1987. At that time, the bills of lading on the tank car were allegedly placed in CXS's waybox. NOTC had notified CSX at approximately 6:30 p.m. that the tank car would be delivered shortly.

CSX: The tank car had not been inspected or accepted by CSX when the explosion and fire occurred at approximately 1:50 a.m. on September 9, 1987. The fire was not completely extinguished until 1:55 p.m. on September 10, 1987.

All defendants sought summary judgment on the exemplary damages issue. NOTC, Illinois Central, and CSX argued that federal regulations promulgated by the Department of Transportation preempt the application of the Louisiana code article. All eight defendants claim they do not qualify for liability under La.C.C. art. 2315.3 because of "status" issues.

The trial court denied all of the motions for summary judgment on July 19, 1995. Defendants filed motions for reconsideration and motions for new trial, which were also denied, on November 30, 1995. All eight defendants sought this court's supervisory jurisdiction.

Federal pre-emption

First, Illinois Central, NOTC, and CSX claim that they have no liability under La.C.C. art. 2315.3 because the effects of the codal article are preempted by the Federal Railroad Safety Act, 45 U.S.C. §§ 421-447 [hereinafter

"FRSA"]. 45 U.S.C. § 434, relative to the preemptive effect of the Federal Railroad Safety Act, provides as follows:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard, relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The pre-emption doctrine has its roots in the Supremacy Clause of the U.S. Const. art. VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to" federal law. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 720-721 (1985). Basic to this constitutional command is the notion that all state provisions which conflict with federal law are without effect. *Maryland v. Louisiana,* 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 596 (1981). Pre-emption may be either express or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 674-675 (1982).

Therefore, when a state statute conflicts with or frustrates federal law, the former is preempted and can have no effect. U.S. Const., Art. VI, cl. 2; *Maryland,* 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d at 596. In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law should be reluctant to find pre-emption. Evidence of preemptive purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95, 103 S.Ct. 2890, 2898, 77 L.Ed.2d 490, 499-500 (1983). If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658, 662-664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387, 395-396 (1993).

Relative specifically to the preemptive effect of the FRSA, the United States Supreme Court held in the *CSX Transportation, Inc.* case that the federal regulations which set the maximum operating speeds for all freight and passenger trains preempted the plaintiff's claim that the defendant's train was travelling at an excessive rate of speed. The facts of the case revealed that the train was travelling under the maximum speed when the accident occurred. In footnote 15 of the opinion, the Court recognized that the "preemption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." *CSX Transportation, Inc.,* 507 U.S. at 675, 113 S.Ct. at 1743.

The Louisiana First Circuit Court of Appeal in *Haydel v. Hercules Transport, Inc.*, 94-1246 (La.App. 1 Cir. 4/7/95), 654 So.2d 418, *writ denied,* 95-1172 (La. 6/23/95), 656 So.2d 1019, considered a very similar issue to the one presented by this case. In *Haydel,* the court concluded that application of La.C.C. article 2315.3 was not preempted by the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.[1] [hereinafter "HMTA"]. In concluding that the statute was not preempted by the HMTA, the court noted that the purpose of the HMTA was "to provide adequate protection against the risks of life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 5101.

The preemptive effect of the HMTA is set forth at 49 U.S.C. § 5125(b)(1) as follows:

> Except as provided in subsection (c) of this section, a law, regulation, order, or other requirement of a State . . . about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:
>
> . . . .

[1] The HMTA is a law relating to railroad safety and § 434 of the FRSA applies to the HMTA as it relates to the transportation of hazardous material by rail. *CSX Transportation, Inc. v. Public Utilities Commission of Ohio,* 901 F.2d 497, 501 (6th Cir.1990), *cert. denied, Public Utilities Commission of Ohio v. CSX Transportation, Inc.,* 498 U.S. 1066, 111 S.Ct. 781, 112 L.Ed.2d 845 (1991).

> (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous materials.

The HMTA also provides a civil penalty to be assessed for violations of any of the provisions of the act. 49 U.S.C. § 5123 states that "[a] person who knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation." The defendants in *Haydel* contended that the statute preempted the effect of La.C.C. art. 2315.3 because the Louisiana law was not substantially the same as the federal provision; the First Circuit disagreed with the defendants. The court concluded that the statutes addressed separate and distinct issues, stating as follows:

> However, LSA-C.C. art. 2315.3 merely sets forth a cause of action for exemplary damages in favor of an individual person who is injured due to a defendant's wanton or reckless disregard for public safety while engaged in the storage, handling, or transportation of hazardous materials, which are defined by federal law. Therefore, while the Louisiana state provision is substantively different from the federal provision, the federal and state statutes address totally separate and distinct subject matters.
>
> Further, the federal penalty provision (49 U.S.C. § 5123) does not provide a remedy for individual persons injured as a result of the handling of hazardous materials; it authorizes the imposition of a fine to be paid to the federal government in the event that a person knowingly violates the HMTA. Conversely, the provisions of LSA-C.C. art. 2315.3 operate in favor of the individual damaged

> by the careless disregard in the handling of hazardous materials, but do not impose any sort of civil penalty in favor of any governmental body.

Haydel, 654 So.2d at 418.

We find the reasoning of the *Haydel* case applicable to the FRSA, as well as to the HMTA – the FRSA does not preempt the provisions of La.C.C. art. 2315.3. Like the HMTA, the penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials. Because the fines and penalties of the two provisions have different purposes, we hold that the FRSA does not preempt La.C.C. art. 2315.3.

Moreover, this conclusion is not inconsistent with the Louisiana Supreme Court's statements in *Billiot v. B.P. Oil Co.,* 93-1118 (La. 9/29/94), 645 So.2d 604, that one of the three-fold purposes of La.C.C. art. 2315.3 is "to provide victims injured by such conduct with the incentive to act as the prosecutors of penal laws against such wrongdoers." *Id.* at 613. The fact that the Supreme Court observed in that case that "the purpose of the duty and the penalty [of La.C.C. art. 2315.3] are not to compensate the victim but to protect the public from risks of harm from toxic and hazardous substances by punishing and deterring violations of that duty to the public" does not mean that the statute is preempted by the FRSA, a question not even alluded to in *Billiot.*

Accordingly, we find that the trial court properly denied the motions for summary judgment based on federal pre-emption filed by Illinois Central, NOTC, and CSX. That judgment is hereby affirmed.

Status issues

By the second judgment at issue in the instant consolidated supervisory writ applications, the trial court denied motions for summary judgment filed by all eight individual defendants, in which they each claim that they cannot be found liable under La.C.C. art. 2315.3 because they were not engaged in "storage, handling, or transportation" the butadiene at the time of the explosion and resulting fire.

La.C.C. art. 2315.3 provides as follows:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substance shall not include electricity.

Obviously, La.C.C. art. 2315.3 does not require the victim's injury to have been caused by the exposure to a toxic substance; the victim must show only that the injuries were caused by the defendant's reckless conduct in handling a hazardous or toxic substance. *Tillman v. CSX Transportation Co.*, 617 So.2d 46 (La.App. 4th Cir.1993), *writ denied,* 625 So.2d 172 (La.1993). *See also Billiot,* 645 So.2d at 620 (on rehearing). Moreover, "[i]mplicit in storing, handling or transporting is the requirement that the hazardous substance be in the possession or control of a person who then handles or otherwise deals with that substance." *Wiltz v. Mobil Oil Exploration and Producing, N.A., Inc.*, 702 F.Supp. 607, 608 (W.D.La.1989). However, no requirement that the defendant be in possession and

control of the hazardous substance at the time of plaintiff's injury exists. *King v. E.I. DuPont De Nemours,* 850 F.Supp. 503 (W.D.La.1994). *The statute, since it imposes a penalty, must be strictly construed. Chustz v. J.B. Hunt Transport, Inc.*, 95-0356 (La. 11/6/95), 662 So.2d 450.

None of the defendants claim that butadiene is not a hazardous or toxic substance under the provisions of La.C.C. art. 2315.3. Rather each of the defendants claims that the evidence presented on the trial of the motion for summary judgment is sufficient to prove that it cannot be liable under the article because it was not involved in the storage, handling, or transportation of the butadiene at the time the explosion and fire occurred.

The trial court judgment denying the motions or summary judgment on the status issues is based almost exclusively on *Tillman,* 617 So.2d 46. In that case, this court held that a truck driver injured in a collision with a train which was carrying hazardous substances had a cause of action under La.C.C. art. 2315.3, even though his injuries were not caused by the hazardous materials themselves. The reasoning of that case does not apply to the instant case, where the injuries unquestionably were caused by the hazardous substances being transported. The result in *Tillman* is based on the causation issue, not the status issue presented by this case. The status of the defendant as an entity which was involved in the storage, handling, or transportation of a hazardous substance at the time of the accident in *Tillman* was uncontested.

The actions of each of the individual entities filing motions for summary judgment are summarized below.

AMF-BRD: AMF-BRD's only involvement with the tank car was as manufacturer of the tank. Certainly, the

plaintiffs make no allegations that AMF-BRD, Inc. had possession or control over the tank car at the time or after the time it was loaded with the butadiene. In fact, the uncontested record evidence shows that AMF-BRD has had no connection with the tank car since 1966. Thus, there is no evidence indicating that AMF-BRD was ever involved in storage, handling, or transportation of the butadiene in the instant case.

Accordingly, the trial court erred in denying AMF-BRD's motion for summary judgment. As the defendant was not involved in the storage, handling or transportation of the butadiene, it cannot be liable for exemplary damages under La.C.C. art. 2315.3. The trial court judgment denying AMF-BRD's motion for summary judgment is therefore reversed; AMF-BRD's motion for summary judgment on the issue of exemplary damages under La.C.C. art. 2315.3 is granted.

Phillips: Phillips also argues that it was not involved in the storage, handling or transportation of the butadiene. Phillips purchased the tank car from North American in September of 1979. During the time it owned the tank car, Phillips performed maintenance repairs on three occasions, the last time in November of 1986. The tank car was then sold to GATC in December of 1986. Thus, Phillips had no involvement in the loading and transporting of the butadiene in the tank car in September of 1987.

The jurisprudence interpreting La.C.C. art. 2315.3 requires a finding that the defendant have some possession or control over the hazardous substance prior to the victim's injuries. Because Phillips never had possession or control over the butadiene in the instant case, Phillips was not involved in the "storage, handling, or transportation"

of the hazardous substance and cannot be held liable for exemplary damages under C.C. art. 2315.3. It is true that all of the maintenance procedures performed on the tank car involved the gasket which the plaintiffs allege was defective; however, that fact does not bring Phillips under the ambit of La.C.C. art. 2315.3. Accordingly, the trial court erred in denying Phillips' motion for summary judgment on the exemplary damages issue. The trial court judgment is reversed, and the motion for summary judgment on the issue of exemplary damages in favor of Phillips is granted.

GATC: GATC was the owner of the tank car, having purchased the tank car from Phillips "as is, where is" in December of 1986. GATC then leased the tank car to Mitsui in February of 1987, and had no contact with the tank car after that date. Further, GATC had no connection with the butadiene cargo the tank was carrying and therefore was not involved in the actual storage, handling, or transportation of the butadiene. Under La.C.C. art. 2315.3 and the interpretive jurisprudence, GATC cannot be liable for exemplary damages and the trial court erred in denying General American's motion for summary judgment on the exemplary damages issue. The trial court judgment is reversed; General American's motion for summary judgment on the issue of exemplary damages is hereby granted.

Mitsui: Mitsui leased the tank car from GATC in February of 1987 and allowed Polysar to use it to transport the butadiene in November of 1987 as a "business favor." Mitsui claims that it had nothing to do with the loading or transportation of the butadiene. However, Polysar claims it contracted with and relied upon Mitsui to perform all the steps necessary to transfer the cargo from

the ship at Goodhope to its plant in Chattanooga. The bill of lading named Mitsui as shipper.

Mitsui denies Polysar's allegations that it was responsible for the shipment of the butadiene, and claims that it simply assisted Polysar in obtaining transportation for the shipment of butadiene. The chemical was directly offloaded from the ship to the tank car by employees of GATX Terminals, who had previously loaded tank cars on lease to Mitsui with butadiene owned by Mitsui. Mitsui claims it simply asked GATX to offload the butadiene on Polysar's request. Concerning the bill of lading, Mitsui claims it simply used a pre-printed form, and that Mitsui's name should have been crossed out and replaced with Polysar's name.

As indicated by these facts, a material issue concerning who had control over the shipping of the butadiene exists, making summary judgment inappropriate. Mitsui contends that Polysar had control over the entire operation; Polysar alleges that Mitsui had responsibility for handling the entire matter. In light of these conflicting contentions, the trial court judgment denying Mitsui's motion for summary judgment on the issue of exemplary damages is correct. The difference between Mitsui and the defendants discussed above is that Mitsui may have been involved in a series of events related to the transportation of this particular load of butadiene, while the above defendants never had any connection with the transportation of this butadiene but only had a past relationship with the tank car. If Polysar proves at trial that Mitsui was responsible for the shipping, and if the plaintiffs prove that Mitsui performed its duties related to the shipping in a wanton and reckless manner, Mitsui could be subject to La.C.C. art. 2315.3 exemplary damages. The denial motion

for summary judgment on the exemplary damage issue filed by Mitsui is hereby affirmed.

Polysar: Polysar owned the butadiene in question, having purchased it overseas. However, Polysar claims that it was not involved in "storage, handling, or transportation" of the butadiene at the time of the explosion and resulting fire. In support of this argument, Polysar claims that it contracted with Mitsui to handle shipping of the butadiene.

As noted above, genuine issues of material fact making summary judgment inappropriate exist concerning the party having responsibility for the shipping of the butadiene. Like Mitsui, the record indicates that Polysar could have some liability for La.C.C. art. 2315.3 exemplary damages, if Mitsui proves that it was responsible for the shipping, and the plaintiffs prove that Polysar performed its duties related to the shipping in a wanton and reckless manner. Under those circumstances, Polysar would have been involved in a series of events related to the transportation of this particular load of butadiene. Accordingly, the trial court judgment denying the motion for summary judgment on the issue of La.C.C. art. 2315.3 exemplary damages filed by Polysar is correct. That judgment is affirmed.

Illinois Central: After the tank car was loaded by GATX employees, it was transferred to Illinois Central, which transported the tank car from the GATX facility in Goodhope to Jefferson Parish, where it turned the car over to NOTC. Despite the fact that it was unquestionably involved in storage, handling, or transportation of the butadiene, Illinois Central claims that it could not be liable under La.C.C. art. 2315.3 for two reasons: (1)

undisputed evidence indicates that it conducted multiple inspections; and (2) it delivered the tank car to NOTC more than 48 hours prior to the time the tank car started leaking, according to the plaintiffs' allegations. Because it had no involvement with the tank car at the time of the explosion and fire, Illinois Central claims that La.C.C. art. 2315.3 has no application on its face.

We disagree with this interpretation of La.C.C. art. 2315.3. Nothing in the express language of the statute requires a finding that a person or entity be physically involved with the hazardous substance at the time the incident occurs as a prerequisite to liability. Without question Illinois Central was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Thus, a genuine issue of material fact concerning Illinois Central's liability under La.C.C. art. 2315.3 exists, making summary judgment inappropriate. The trial court judgment denying the motion for summary judgment filed by Illinois Central is correct; it is hereby affirmed.

NOTC: NOTC received the tank car from Illinois Central and delivered it to the CSX interchange in New Orleans East where the explosion and fire occurred at approximately 7:25 p.m. September 8, 1987, some seven hours prior to the time the explosion occurred. NOTC claims that it placed the bills of lading for the tank car in CSX's waybox at that time. Moreover, NOTC had notified CSX at approximately 6:30 p.m. that day that the tank car was to be delivered shortly. NOTC, like Illinois Central, claims that it could not be liable under La.C.C. art. 2315.3

because it was not involved in the storage, handling, or transportation of the butadiene at the exact time of the explosion. The same analysis as applied to Illinois Central also applies to NOTC – the statute does not require that a liable party be involved with the hazardous substance at the time of the incident causing damage. NOTC, like Illinois Central, was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Accordingly, genuine issues of material fact concerning NOTC's liability remain, and the trial court properly denied the motion for summary judgment on the issue of exemplary damages filed by NOTC.

Moreover, the record indicates that NOTC's possible liability under La.C.C. art. 2315.3 may not hinge solely on its role as of transporter of the butadiene; NOTC may also be vicariously liable for the negligence of its employees in failing to notify their supervisor or CSX of odors emanating from the area of the tank car prior to the explosion. At approximately 10:30 p.m., Ronald Williams, an NOTC engineer, while in the CSX yard, detected an unusual odor, which he dismissed as a dead animal. Ernest Thibodeaux, another NOTC employee, also noted the odor, which he said resembled butadiene, but told no one. During the depositions of these men, the plaintiffs attempted to discover the extent of training the company gave their employees concerning the transportation of hazardous materials. Plaintiffs could therefore be awarded exemplary damages against NOTC on the basis of the fact that the actions of its employees of were wanton and reckless. For that reason also, the trial court judgment denying the

motion for summary judgment is correct. That judgment is hereby affirmed.

CSX: NOTC transported the tank car to the CSX interchange in New Orleans East at approximately 7:25 p.m. on September 8, 1987. The car was sitting at that interchange, which is located in a heavily-populated area, when the explosion and fire occurred. Nevertheless, CSX claims that it cannot be liable for exemplary damages under La.C.C. art. 2315.3 because it had not inspected or accepted the tank car prior to the incident and because it was not involved in the storage, handling, or transportation of the butadiene at the time of the explosion. On the other hand, NOTC claims that the bills of lading had been placed in CSX's waybox when the tank car was delivered to the CSX exchange approximately seven hours prior to the explosion and fire which caused the damages in the instant case. That action, NOTC indicates, transferred custody of the tank car to CSX.

As noted above in the discussions concerning Illinois Central and NOTC, La.C.C. art. 2315.3 does not require that the defendant be actively involved in the storage, handling, or transportation of the substance at the time of the incident. CSX, like Illinois Central and NOTC, was involved in the series of events related to the transportation of this particular load of butadiene, and therefore could be held liable under for La.C.C. art. 2315.3 exemplary damages, if the plaintiffs can prove that it performed its duties in a wanton and reckless manner. Accordingly, the trial court judgment denying the motion for summary judgment on the issue of exemplary damages in favor of CSX is correct; it is hereby affirmed.

Conclusion

For the foregoing reasons, the trial court judgment denying the motions for summary judgment filed by Illinois Central, NOTC, and CSX based on federal pre-emption are affirmed. Moreover, the trial court judgment denying the motions for summary judgment filed by Mitsui, Polysar, Illinois Central, NOTC, and CSX based on the status issues are affirmed. However, the trial court judgment denying the motions for summary judgment filed by AMF-BRD, Phillips, and GATC based on the status issues are reversed. Summary judgment on the exemplary damages issues under La.C.C. art. 2315.3 is granted in favor of AMF-BRD, Phillips, and GATC. The case is remanded for further proceedings consistent with this decision.

WRIT GRANTED; TRIAL COURT JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; REMANDED.

LOBRANO, Judge, concurring.

I concur with the majority result on both the status and federal pre-emption issues. However, I am not satisfied with test used in *Haydel v. Hercules Transport Inc.*, 94-1246 (La.App. 1st Cir. 4/7/95), 654 So.2d 418, *writ denied,* 95-1172 (La. 6/23/95), 656 So.2d 1019 to determine if a state statute is preempted by federal legislation. In my opinion a more straightforward and concise test should be whether the state statute conflicts with *and* is contrary to the purpose or result of a federal statute. If so, then the state statute should give way to the federal legislation.

In the instant case La.C.C. art. 2315.3 does not conflict with federal legislation.

Supreme Court, U.S.
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No. 02-1067

In the Supreme Court of the United States

OCTOBER TERM, 2002

NOVA CHEMICALS, INC.,

Petitioner,

v.

LEONARD ADAMS; MICHAEL NOAL;
VIRGINIA PHILLIPS; DEBRA BLACK,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF OF AMICI CURIAE AMERICAN CHEMISTRY COUNCIL; AMERICAN PETROLEUM INSTITUTE; AMERICAN TRUCKING ASSOCIATIONS, INC.; CHLORINE INSTITUTE, INC.; COMPRESSED GAS ASSOCIATION; DANGEROUS GOODS ADVISORY COUNCIL; FERTILIZER INSTITUTE; INSTITUTE OF MAKERS OF EXPLOSIVES; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; NATIONAL PAINT AND COATINGS ASSOCIATION, INC.; NATIONAL TANK TRUCK CARRIERS, INC.; AND SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

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INTEREST OF AMICI CURIAE

The American Chemistry Council (ACC) is an industry group that represents America's leading chemical producers.[1] Chemical production is a $460 billion annual business and a key element of the Nation's economy. Chemical producers are America's leading exporters, with more than $80 billion of exports in 2000. ACC's 175 member companies constitute more than 90% of the industrial chemical-production business in the United States and are heavily involved in the shipment of hazardous materials. As a condition of membership in ACC, member companies participate in the Responsible Care® initiative, an industry-wide safety and security program.

The American Petroleum Institute (API) represents more than 400 member companies in all aspects of the petroleum industry. API members own petroleum terminals and truck and rail fleets for the distribution of petroleum products. API and its members have a longstanding commitment to providing safe transportation of petroleum products in compliance with federal hazardous materials law.

The American Trucking Associations, Inc. (ATA), is the national trade association of the trucking industry. Its membership includes more than 2,000 trucking companies and suppliers of equipment and services. In cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers, including for-hire carriers, private carriers, leasing companies, and others. ATA was created to promote and protect the interests of the trucking industry. ATA regularly

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.2, letters evidencing this consent have been filed with the Clerk.

advocates the trucking industry's position before this Court and other courts.

The Chlorine Institute, Inc. (CI), is a 225-member worldwide association of producers, packagers, distributors, users, and suppliers of certain chemicals. CI's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution, and use of those chemicals. Because each of those chemicals is a hazardous material, CI is concerned with all facets of hazardous materials transportation.

The Compressed Gas Association (CGA) is a non-profit association dedicated to the development and promotion of safety standards and safe practices in the industrial and medical gas industry. It represents manufacturers, distributors, suppliers, and transporters of gases, cryogenic liquids, and related products.

The Dangerous Goods Advisory Council (DGAC) is a non-profit association established to promote the safe transportation of hazardous materials by supporting adoption of sound, effective, and uniform safety standards and by providing an extensive training program. DGAC comprises 158 member companies that ship hazardous materials, and 21 trade associations representing thousands of shippers, producers, distributors, and manufacturers.

The Fertilizer Institute (TFI) is the national trade association of the fertilizer industry. TFI's members include the Nation's fertilizer producers, manufacturers, retailers, trading firms, and equipment manufacturers.

The Institute of Makers of Explosives (IME) represents American manufacturers and distributors of high explosives, and related companies. IME member companies produce over 95% of the more than 2.5 million metric tons of explosives consumed annually in the United States, and distribute more than $1 billion in explosive products per year worldwide. IME

is concerned with ensuring the safe and secure manufacture, transportation, and distribution of those products.

The National Industrial Transportation League (NITL) is a national trade association representing about 700 companies that conduct industrial and commercial enterprises both domestically and internationally and are concerned with the transportation of goods in domestic and international commerce. NITL members are involved in all modes of transportation, including transportation by road and by rail. Numerous NITL members transport, ship, and receive large quantities of hazardous materials regulated under federal law.

The National Paint and Coatings Association, Inc. (NPCA), is an industry association comprising some 400 members engaged in the manufacture and distribution of paint, coatings, adhesives, and related products, and the raw materials used to produce these products. The paint and coatings industry uses a variety of methods of transportation to distribute its products throughout the Nation, particularly road and rail. Virtually all of NPCA's members transport, or cause to be transported, hazardous materials subject to federal regulation. NPCA members participate in Coating Care®, a voluntary initiative designed to promote the safe, efficient, and secure transportation and distribution of paint and coatings products.

National Tank Truck Carriers, Inc. (NTTC), is a trade association composed of about 180 trucking companies specializing in the nationwide distribution of hazardous materials. Almost all of NTTC's members are subject to federal hazardous materials law. NTTC members operate in all 50 states and virtually all local jurisdictions.

The Synthetic Organic Chemical Manufacturers Association (SOCMA) is a trade association representing batch and custom chemical manufacturers. More than 2,000 batch processing facilities produce the 50,000 specialty and custom chemicals manufactured in the United States, at a value of about $60

billion per year. SOCMA's 320 members rely on the Nation's hazardous materials transportation network to ship their raw materials, intermediates, and products. As a condition of membership in SOCMA, member companies participate in the Responsible Care® initiative, an industry-wide safety and security program.

SUMMARY OF ARGUMENT

This case presents a vital question of federal preemption, with significant ramifications both for public safety and for homeland security. The Louisiana Court of Appeals held that the owner of hazardous materials could be liable for tort damages under state law, even though the owner contracted with a qualified independent shipper to handle the storage and loading of those materials. That requirement is expressly preempted by federal law, which explicitly takes into account contractual arrangements between the parties in determining which entity is responsible for hazardous materials shipments. The Louisiana Court of Appeals' decision not only is inconsistent with the congressionally stated desire for uniformity in the regulation of hazardous materials shipments, but will impose crippling, unnecessary, and potentially counterproductive obligations on *amici*'s members. Moreover, if the Louisiana Court of Appeals' decision is allowed to stand, other States will be given a green light to impose additional requirements of their own. Because this is a case of substantial legal and practical importance, *certiorari* is warranted.

REASONS FOR GRANTING THE WRIT

I. FEDERAL LAW PREEMPTS THE LOUISIANA COURT OF APPEALS' REQUIREMENT THAT OWNERS HAVE A DUTY OF CARE IN THE SHIPMENT OF HAZARDOUS MATERIALS.

As a matter of law, the Louisiana Court of Appeals' requirement that an owner of hazardous materials has a nondelegable, tort-based duty of care, even where that owner

has entered into an agreement with an independent contractor for the shipment of those materials, is clearly preempted by the elaborate federal regulatory scheme governing such shipments.

A. In 1975, Congress enacted the Hazardous Materials Transportation Act (HMTA), Pub. L. No. 93-633, 88 Stat. 2156. The HMTA was designed to "replace a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations." *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990).

In 1990, Congress enacted the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), Pub. L. No. 101-615, 104 Stat. 3244, which substantially amended the HMTA. In the HMTUSA, Congress made statutory findings emphasizing the desirability of uniform standards for the shipment of hazardous materials. *See* 49 App. U.S.C. § 1801 note (1993). In particular, Congress stressed that divergent state and local laws "creat[ed] the potential for unreasonable hazards in other jurisdictions and confound[ed] shippers and carriers which attempt[ed] to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements." *Id.* In fact, Congress felt so strongly about the need for a uniform regulatory scheme that it gave DOT plenary authority to regulate intrastate and foreign hazardous materials shipments, as well as interstate ones. *See* 49 U.S.C. § 5103(b)(1).

B. In order to effectuate a uniform national scheme of hazardous materials regulation, Congress included a broad express-preemption provision, which essentially codifies this Court's test for implied preemption. That provision, which was initially set out in a Department of Transportation (DOT) regulation and was subsequently codified in materially identical form in the HMTUSA, provides that any state "requirement" is preempted either if it is impossible to comply both with that requirement and with any federal statutory or regulatory

hazardous materials requirement, or (as is relevant here) if the state requirement constitutes an obstacle to accomplishing and carrying out any federal hazardous materials statute or regulation. *See* 49 U.S.C. § 5125(a). Notably, in the recently enacted Homeland Security Act, which created the new Department of Homeland Security (DHS) in the wake of the 2001 terrorist attacks, Congress amended the express-preemption provision in the HMTUSA to make clear that state law is subject to preemption not only by statute or by regulations promulgated by DOT, but also by any regulations or directives issued by the new DHS relating to hazardous materials transportation security. *See* Pub. L. No. 107-296, § 1711(b)(2), 116 Stat. 2135, 2320 (2002) (amending 49 U.S.C. § 5125(a)).[2]

In light of the breadth of this express-preemption provision, it is perhaps unsurprising that two courts of appeals have held that state hazardous materials regulations are preempted, even where those regulations impose comparatively light obligations on shippers and carriers. For instance, in *Southern Pacific Transportation Co.*, the Ninth Circuit held that a state requirement that carriers of hazardous materials obtain a permit was preempted by HMTA, on the ground that such a requirement would "create a separate regulatory regime for these activities, fostering confusion and frustrating Congress' goal of developing a uniform, national scheme of regulation." 909 F.2d at 358. In a subsequent case involving *amicus* Chlorine Institute, the same court similarly held that a state requirement that certain vehicles transporting hazardous materials be accompanied by escort vehicles was preempted. *See Chlorine Inst. v. California Highway Patrol*, 29 F.3d 495,

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[2] In addition, the Homeland Security Act expressly authorizes DOT to issue regulations relating to the security of hazardous materials transportation, on top of its preexisting responsibility to issue regulations regarding *safety*. *See* Pub. L. No. 107-296, § 1711(b)(1), 116 Stat. at 2319 (amending 49 U.S.C. § 5103(b)(1)).

497-98 (9th Cir. 1994). And the Tenth Circuit similarly found preemption with regard to a state regulatory scheme that would have required carriers to obtain a permit, carry certain documentation, and provide advance notification of shipments. *See Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1583 (10th Cir. 1991).

C. Even by the usual standards of federal regulation, the regulatory scheme outlined by the HMTA and HMTUSA, *see* 49 U.S.C. §§ 5101-5127, and implemented by DOT, *see* 49 C.F.R. pts. 171-180, is an extraordinarily voluminous and complex one. That regulatory scheme imposes detailed obligations on persons who "offer or accept a hazardous material for transportation in commerce." 49 C.F.R. § 171.2(a). And the statute imposes civil and criminal penalties for violations of the regulations. *See* 49 U.S.C. §§ 5123-5124.

DOT's regulations do not contain an explicit definition of what constitutes an "offeror," and therefore what entities are responsible for hazardous materials shipments under the elaborate federal regulatory regime. However, in a series of informal rulings, and ultimately in a formal interpretation of the regulations, DOT has established clear standards for determining whether a owner or a shipper is an "offeror." Specifically, in its formal interpretation, DOT made clear that the "contractual arrangements between the parties" are an important factor in determining which entity constitutes the "offeror." Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act, 55 Fed. Reg. 6758, 6761 (Feb. 26, 1990).

D. The Louisiana Court of Appeals' decision creates a state-law requirement that is arguably more sweeping than any of the state hazardous materials requirements already found to be preempted by the Ninth and Tenth Circuits. The effect of the Louisiana Court of Appeals' decision is to impose a nondelegable duty of care on owners of hazardous materials which bear no obligations under federal law. That duty at a

minimum presents an obstacle to the effectuation of the federal regulatory regime, which allows owners of hazardous materials to enter into contractual agreements with qualified and independent shippers to handle the storage and loading of those materials, and thereby to shift responsibility, and liability, to those shippers. *Cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-75 (1993) (holding that federal regulation on maximum train speed preempted state common-law duty to operate train at moderate and safe rate of speed). The Louisiana Court of Appeals' decision effectively precludes owners from contracting out responsibility for shipments that pass through Louisiana — in this case, a shipment traveling from Portugal to Tennessee — and therefore introduces inconsistency into an otherwise uniform national scheme. For this reason, the Louisiana Court of Appeals' decision is erroneous. This Court should either summarily reverse that decision, or grant *certiorari* to review it. To the extent the Court is uncertain whether *certiorari* is warranted, it should call for the views of the Office of the Solicitor General, which has argued cases even in the courts of appeals involving HMTA and HMTUSA preemption. *See, e.g., Colorado Pub. Utils. Comm'n*, 951 F.2d at 1574.

II. IF ALLOWED TO STAND, THE LOUISIANA COURT OF APPEALS' DECISION WILL HAVE ENORMOUS PRACTICAL IMPLICATIONS.

Absent this Court's intervention, the Louisiana Court of Appeals' decision will impose crippling, unnecessary, and potentially counterproductive obligations on *amici*'s members. More than 3.2 billion tons of hazardous materials are shipped in the United States per year by truck, train, ship, and plane, with some 800,000 shipments occurring every day. *See* Departmentwide Program Evaluation of the Hazardous Materials Transportation Programs at i, v (DOT March 2000). *Amici*'s members offer for transportation, or themselves transport, a substantial percentage of those shipments. Ensuring

that this massive volume of hazardous materials moves safely and securely through all 50 states and more than 33,000 local jurisdictions is a daunting task — one that would be made impossible if each jurisdiction could impose its own regulations. The Louisiana Court of Appeals' decision will have tangible consequences for *amici*'s members in two primary ways.

A. The Louisiana Court of Appeals' decision will require owners of hazardous materials, most of which have no expertise in the shipment of such materials, and many of which are small businesses, to supervise shipments while they are traveling through the State of Louisiana. It will no longer be possible for an owner to enter into a contractual arrangement with a shipper experienced in handling hazardous materials, and thus delegate responsibility to that shipper. As the petition notes, the owner will effectively be required to "ride shotgun" with the shipment, providing its own inspectors to oversee the performance of persons not in the owner's employ. *See* Pet. 20. Indeed, this oversight obligation may continue even after the shipment has been delivered, to the extent that residue of the materials being shipped is left in the container or vehicle and therefore remains subject to federal regulation. The introduction of additional inspectors will lead to delays, which in and of themselves could increase the risk of accidents and also compromise the security of hazardous materials shipments, a prime target for terrorists. *See, e.g.*, Brian DeBose & Guy Taylor, *Trucks with Hazardous Cargo Get Heightened Scrutiny*, Wash. Times, Sept. 28, 2001, at B1. It will also lead to a hopeless fragmentation of responsibility for hazardous materials shipments, particularly in cases in which materials owned by a large number of different companies are transported in a single container or vehicle. The safety and security implications of this additional requirement are especially acute because Louisiana is a vital hub in the transportation of hazardous materials throughout the United States. *See* Pet. 21-22.

B. The Louisiana Court of Appeals' decision will also impose massive costs on the owners of hazardous materials — costs that will only be exacerbated if other States, emboldened by this Court's refusal to intervene, impose similar requirements. In the wake of the 2001 terrorist attacks, hazardous materials producers have already made substantial investments in increased security, despite worsening economic conditions. Should the Louisiana Court of Appeals' decision be allowed to stand, hazardous materials owners will be required either to devote additional scarce resources to the nondelegable obligation of overseeing shipments while they are traveling through Louisiana, or to reroute their shipments to avoid Louisiana altogether where possible (thereby unfairly exporting risk to other States that do not seek to impose additional obligations of their own). This Court should act to ensure that companies involved in hazardous materials transportation are free from such State-imposed obligations, and thereby protect the integrity of the federal regulatory scheme.

CONCLUSION

This Court should summarily reverse the decision of the Louisiana Court of Appeals. In the alternative, the Court should grant the petition for writ of *certiorari* and set the case for full briefing and oral argument. At a minimum, the Court should invite the Solicitor General to express the views of the United States on this issue of vital importance to American industry.

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No. 02-1067

In the Supreme Court of the United States

IN RE NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

NOVA CHEMICALS INC.,

PETITIONER,

v.

LEONARD ADAMS, MICHAEL NOAL, VIRGINIA PHILLIPS, DEBRA BLACK, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Petition made four basic points, which together establish an urgent need for this Court's intervention. First, the Louisiana Fourth Circuit Court of Appeal squarely held that responsibility for the safe transport of hazardous materials may not be delegated by the owner of those materials to an expert shipping company, as a matter of state law. Second, Louisiana's non-delegation rule is clearly inconsistent with, and therefore preempted by, the comprehensive federal scheme governing hazardous materials transportation, which explicitly encourages such delegation. Third, this Louisiana rule imposes an excessive and unjustified burden on interstate commerce, in violation of the dormant Commerce Clause. Fourth, unless it is reversed by this Court, the rule adopted by Louisiana in this case will have an enormous and immediate negative impact on the safety and efficiency of our Nation's transportation system.

Remarkably, the Brief in Opposition does not dispute *any* of these points. It instead seeks only to obscure the important questions presented behind two purported vehicle problems, neither of which has any merit.

I. THE BRIEF IN OPPOSITION EFFECTIVELY CONCEDES THAT THE RULE ADOPTED BY LOUISIANA IN THIS CASE IS IN DIRECT CONFLICT WITH FEDERAL LAW

In the final paragraph of their Brief in Opposition, Respondents concede that the Louisiana Fourth Circuit Court of Appeal held that responsibility for safe transportation of hazardous materials cannot be delegated away from the owner of those materials, *as a matter of Louisiana tort law.* Opp. 12. Respondents also concede (by their complete silence on these issues) that the court of appeal's holding is in direct conflict with the applicable federal regulations, and is therefore preempted by the

Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990) ("HMTA"). Instead of challenging the existence and importance of that square conflict with federal law, Respondents suggest that the Louisiana court's actual holding is somehow "moot" or "not necessary" because that court made "findings" that would have been sufficient to support an alternative holding that Polysar also violated the federal regulations. Opp. 12. That suggestion is both plainly incorrect and irrelevant.

Respondents carefully avoid any assertion that the Louisiana court of appeal *actually held*, in the alternative, that Polysar had not effectively delegated compliance responsibility to Mitsui and GATX under the federal regulations. The plain language of the court's opinion dispels any confusion on that point. The Louisiana court held that "[b]ecause of the importance of those duties to the public safety, we view those duties as non-delegable *as a matter of Louisiana tort law.*" Pet. App. 52a (emphasis added). It accordingly held that "whether Mitsui is an 'independent contractor' to Polysar is of no moment"—expressly declining to reach what would have been the central issue under the federal regulations. *Id.*

Indeed, the portions of the court of appeal's decision which purport to discuss the federal regulations are, at most, an artifice: a transparent attempt to cloak a decision that in fact articulates a rule of law completely contrary to those regulations as interpreted authoritatively by the Department of Transportation ("DOT"). The Louisiana court entirely ignores DOT's "functional" test for determining which party is responsible for regulatory compliance. As explained in the Petition (Pet. 9-10), and conceded by Respondents (Opp. 9-10), that test expressly contemplates that such responsibility may be delegated by contract or commercial practice. *See* Notice No. 90-2, Formal Interpretation of Regulations Issued Under the HMTA, 55 Fed. Reg. 6758, 6760 (Feb. 26, 1990)

(compliance responsibility falls on the party "who performs, attempts to perform, or under the circumstances involved is contractually or otherwise responsible to perform, any of the functions assigned by the [regulations]"). DOT has also made it crystal clear that mere ownership of hazardous cargo is *not* sufficient to impose liability under the federal regulations.[1]

The decision of the Louisiana court of appeal defies federal law on both points. That court held that responsibility for the safe transportation of hazardous materials can *never* be delegated away from the owner by contract or custom as a matter of state law. And although the court asserted that Polysar was not a passive owner "simply awaiting delivery" of the butadiene, Pet. App. 47a, it did not even purport to address whether Polysar in fact performed (or was obligated by contract or custom to perform) any relevant *functions* under the regulations. Instead the court pointed to the obvious commercial realities that Polysar paid to have its product shipped, would have been aware that its product would travel over established rail lines, and could conceivably have imposed additional conditions on Mitsui by contract.[2] By fixating on routine activities that every cargo

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[1] *Id.* Respondents imply that the DOT interpretation does not apply because it was issued after the incident involved in this case. DOT's clarifying interpretations did not effect any substantive change in the regulations that existed at the time of the incident. As a result, "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute [regulation] means." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 n.3 (1996); *see also Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (A clarifying rule "does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 135 (1936)). Accordingly, DOT's interpretations respectfully do apply and must be accorded deference. Pet. 10.

[2] Pet. App. 47a. With respect to the Polysar "activities" cited by the

owner must perform, the court's "test" will necessarily and by definition dictate a finding that every cargo owner (irrespective of whether it performed even one compliance function) is the "offeror" responsible for hazardous materials safety compliance in Louisiana. Those observations therefore add nothing to the court's core holding—that state law simply imposes tort liability for transportation safety as a non-delegable incident of ownership. *See* Pet. 16.

Unable to find an actual alternative holding in the court of appeal's decision, Respondents marshal a one-sided selection of snippets from the raw trial transcript to argue that a variety of alternative theories "*could* form the basis for culpable fault." Opp. 12 (emphasis added). Respondents suggest, for example, that the Louisiana court *could have* held that Polysar in fact performed regulated functions, or that contractual responsibility for regulatory compliance was in fact uncertain in this case, or even perhaps that Polysar failed to prove the elements of delegation of duty under Louisiana state law (as if the court had not held that to be a legal impossibility). Opp. 7-12. Polysar of course would disagree with all these assertions,[3] if they had any relevance

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Fourth Circuit, the record at trial established that Polysar: (1) "coordinated the shipment"–merely learning from Mitsui and confirming with Mitsui expected dates of departure and arrival of its cargo; (2) "chose a route"–Polysar agreed that its cargo could travel on an established freight train route between Goodhope and Chattanooga; and (3) "paid the freight"– as a responsible owner of cargo, Polysar agreed to pay the public carrier pursuant to the carrier's customary rate structure.

[3] The record clearly established that Mitsui and GATX in fact performed every one of the functional obligations assigned to the shipper or offeror under the federal regulations; that the contracts between the parties assigned those duties to Mitsui; and that there was a twelve-year past practice between the parties of assigning those duties to Mitsui. Mitsui was clearly the shipper or offeror under the federal regulations, and no court that honestly attempted to apply DOT's "functional" test could come to any other conclusion.

at all to the issues before this Court. They do not. The Louisiana court of appeal did not in fact rely upon any of Respondents' alternative theories. It instead squarely held that they were beside the point. Respondents do not, and cannot, cite any precedent for their apparent belief that this Court should abstain from reviewing what a lower court *actually* held, whenever that court might conceivably have held something different.

Respondents' complete silence concerning the actual issues in this case speaks loudly and confirms the obvious. The fundamental holding of the court of appeal is that in Louisiana HMTA compliance obligations cannot be delegated by often unqualified cargo owners to expert hazardous material handlers. The federal regulations, as interpreted by DOT, expressly permit such delegation by contract or commercial custom. By failing to permit the delegation of responsibility sanctioned and encouraged by federal law, the ruling in this case not only constitutes an obstacle to Congress's goals in passing HMTA but emasculates those goals. The two articulated goals of the HMTA are uniformity and safety. The Louisiana court's ruling displaces uniformity with the probability of chaotic inconsistency. It impermissibly permits Louisiana courts to determine who is responsible to conduct compliance duties pursuant to a standard wholly inconsistent with the uniform functional shipper test articulated by DOT. Concomitantly, safety is severely compromised by replacing compliance experts with amateurs, creating uncertainty and confusion in assignment of responsibility for compliance, and introducing interminable delay in shipments. *See* Pet. 17-26; *infra* pp. 8-9. Respondents' Brief in Opposition does not even disagree with, let alone refute, the Petition's discussion of these serious consequences of the decision below.

II. THE BRIEF IN OPPOSITION DOES NOT DISPUTE THAT LOUISIANA'S RULE IMPOSES AN EXCESSIVE AND UNJUSTIFIED BURDEN ON INTERSTATE COMMERCE

The Brief in Opposition similarly does not even attempt to deny or to justify the excessive and unconstitutional burden that the Louisiana rule adopted in this case imposes on interstate commerce. Respondents do not, because they cannot, genuinely deny that requiring purchasers of hazardous materials to personally perform all compliance responsibilities under the DOT regulations will cripple the efficient movement of the 800,000 daily shipments of hazardous materials in interstate commerce. *See* Pet. 24-26; *infra* pp. 8-9.

Respondents attempt to mask this fatal concession by incorrectly claiming that Polysar did not properly preserve the Commerce Clause issue in the state courts. Opp. 3-4. Their argument improperly ignores the sequence of events below. The particular Commerce Clause issue on which the Petition seeks review was not squarely injected into this case until the appellate court held, *sua sponte*, that all duties relating to hazardous materials transportation are inherently non-delegable as a matter of state law. That rationale had not been advanced by Respondents in the trial court or on appeal, and Polysar accordingly did not anticipate (let alone devote briefing to) the possibility that the appellate court would stray in such an extreme and unprecedented direction. Since the judicially-created state tort law rule that Polysar challenges as a Commerce Clause violation *did not exist* until the court of appeal's decision, Polysar obviously cannot be faulted for failing to challenge it sooner. This Court's requirement that issues be properly presented in the lower courts does not demand clairvoyance. After the court of appeal's decision, Polysar availed itself of

the first opportunity—a petition for rehearing—to explain that the court's novel theory imposed an excessive and unconstitutional burden on interstate commerce.

In any event, Polysar's opening brief to the Fourth Circuit Court of Appeal placed both Respondents and the court on notice that the resolution of this case raised serious issues under the dormant Commerce Clause. Respondents did not argue at trial or upon appeal that hazardous materials compliance obligations were inherently non-delegable as a matter of state law. They did, however, argue (*inter alia*) that Polysar could be held liable for approving shipment along an established rail line passing through New Orleans. Polysar argued in its opening brief on appeal that liability predicated on this "routing" theory would violate the Commerce Clause. Polysar reiterated that point in its Reply Brief, and also responded to Respondents' evolving argument by pointing out that "[i]mposing a duty on the cargo owner to duplicate the contractor's work would throw needless barriers of time and expense across the stream of commerce."

Finally, Respondents did not argue at the rehearing stage or upon certiorari to the Louisiana Supreme Court that Polysar had somehow waived the Commerce Clause infirmity in the court of appeal's decision by failing to divine that court's intentions in advance. In any event, the court of appeal itself denied Polysar's petition for rehearing on the merits, dispelling (and waiving) any suggestion that the arguments therein were procedurally defaulted or improper. Pet. App. 58a. And three Justices of the Louisiana Supreme Court voted to grant certiorari. Respondents' suggestion that the Commerce Clause issue is not properly before this Court is therefore wrong and must be rejected.

III. THE BRIEF IN OPPOSITION DOES NOT DISPUTE THE PRACTICAL IMPORTANCE OF THE LOUISIANA COURT'S DECISION

As the Petition explained in detail, Pet. 17-26, the rule of law adopted by Louisiana in this case literally threatens a disaster for our Nation's transportation system and for every sector of the economy that depends, directly or indirectly, on basic industrial chemicals. The *amicus curiae* brief filed in this Court in support of the Petition by the American Chemistry Council and 11 other major national industry associations illustrates the severe consequences that they believe will result if this decision is not reversed. The Brief in Opposition, remarkably, does not disagree.

The Louisiana decision dictates an unworkable commercial scenario. Federal law expressly contemplates the delegation of complex regulatory compliance responsibilities to the expert shipping companies actually performing (and often consolidating) those regulated functions. In light of the 800,000 shipments of hazardous materials each day, reliance upon traditional allocation of responsibility through accepted industry-wide documentation such as bills of lading is required for the transportation of these products with even a modicum of efficiency and safety. The commodities chemical business employs a variety of business arrangements among producers, sellers and buyers, which are often accomplished verbally or through expedient, truncated telex or e-mail communication. Federal law accommodates these commercial realities by appropriately permitting the allocation of compliance responsibilities by contract to the parties best equipped and positioned to fulfill them.

Such delegation by independent contract is now effectively impossible for any shipment that will pass, at any point, through the State of Louisiana. This impacts as much as 25% of the hazardous material moved in this country every

day. Should Louisiana's distorted view of delegability prevail, allocation of compliance responsibility within the chemical industry will not be possible and certainly not operationally achievable as each new, often-remote owner struggles futilely to conduct compliance duties. Purchasers or owners of hazardous commodities will be unable to appropriately transfer compliance responsibility to entities that, from a logistical and expertise standpoint, are best able to assure efficient and safe transport. They will instead be forced to dispatch a representative to all pertinent transfer points in order to second-guess the shipper's judgment about such matters as packaging, labeling, and inspection.

Our docks, terminals and other points of shipment will be hopelessly strangled by this regime. Security likewise will be seriously compromised as credential-wielding purchaser employees demand access to sensitive areas in order to fulfill compliance responsibilities. The resulting uncertainty and delay will threaten an enviable record of the safe transport of these commodities, and waste countless man-hours and millions of dollars in unproductive duplication and disputes over responsibility whenever cargoes change ownership or cross state lines.

Frankly, compliance with Louisiana's novel dictates simply will not be possible from a manpower or contractual perspective for many of the companies in the affected industries—and if this Court fails to intervene, new infringements into this preempted area by other States will surely follow. Congress enacted the HMTA precisely in order to preempt such chaos with uniform national regulation of hazardous materials transport.

CONCLUSION

The Louisiana ruling that a purchaser of hazardous cargo may not delegate offeror compliance responsibilities under DOT's regulations disrupts a uniform, proven and

reliable system which was carefully designed to ensure safe and efficient transport of hazardous materials. If left to stand, it would have a far-reaching and impermissibly crippling effect on interstate commerce. Petitioner respectfully submits that certiorari is warranted and necessary, and indeed that summary reversal of the Louisiana court of appeal's decision would be appropriate.

Respectfully submitted,

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